Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

October Term, 1997

United States of America,

Petitioner,

v.

Sun-Diamond Growers of California,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the unlawful gratuity statute, 18 U.S.C. § 201(c)(1)(A), which proscribes the giving of anything of value to a federal official "for or because of any official act performed or to be performed by such public official," prohibit a large, agricultural cooperative regulated by the United States Department of Agriculture from bestowing on the Secretary of Agriculture, because of his position, tickets to sporting events, meals, luggage and other gifts, or was the court below correct in reversing the conviction in this case and thereby creating an acknowledged conflict with other circuits that have considered the issue?

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OPINIONS BELOW

The March 20, 1998, decision of the United States Court of Appeals for the District of Columbia Circuit invalidating the conviction of Sun-Diamond Growers of California under the unlawful gratuity statute, 18 U.S.C. § 201(c)(1)(A), is reported at 138 F.3d 961 (D.C. Cir. 1998), and is included as Appendix A. The June 18, 1998 orders of the District of Columbia Circuit denying the United States' timely petition for rehearing and suggestion for rehearing *en banc* (Wald, J., concurring) are included as Appendix B. The District Court's decision denying Sun-Diamond's pretrial motion to dismiss the unlawful gratuity counts is reported at 941 F. Supp. 1262 (D.D.C. 1996), and is included as Appendix C.

JURISDICTION

This Court's jurisdiction to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The District of Columbia Circuit issued its decision on March 20, 1998, and denied the United States' timely petition for rehearing and suggestion for rehearing *en banc* on June 18, 1998. This petition has been filed within ninety days of the Circuit's denial of rehearing as required by Supreme Court Rule 13.1.[1]

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[1] Independent Counsels appointed pursuant to the Ethics in Government Act have the express statutory authority to initiate and conduct prosecutions "in any court of competent jurisdiction," and that authority includes "handling all aspects of any case, in the name of the United States." 28 U.S.C. § 594(a)(9). As this Court has previously suggested in an opinion, and in practice has recognized, § 594(a)(9) is an express exception to the general rule of 28 U.S.C. § 518(a) that "the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . ." *See United States v. Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988) ("Congress has enacted some provisions that suggest exceptions to the blanket coverage of § 518(a)"

STATUTORY PROVISIONS INVOLVED

The unlawful gratuity statute, 18 U.S.C. § 201(c)(1)(A), provides in relevant part as follows:

> Whoever . . . otherwise than as provided by law for the proper discharge of official duty . . . directly or indirectly gives, offers, or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official . . . shall be fined under this title or imprisoned for not more than two years, or both.

"Official act" is defined as

> any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3)

STATEMENT

The decision below raises serious, unresolved questions about an important federal anti-corruption statute, causing one Circuit Judge to write:

> I find the interpretation of 18 U.S.C. § 201(c)(1)(A) (1994) so as not to cover any gifts or gratuities made by a regulated company to high officials of the regulating agency troubling. Given the choice, I would have construed the statutory prohibition as the Fifth Circuit has done. However, I have concluded that calling for a vote on the *en banc* petition would be futile in this case. The current circuit split calls for Supreme Court attention.

(Wald, J., concurring in the denial of suggestion for rehearing *en banc*) App. 34. (internal citations omitted).

1. Independent Counsel Donald C. Smaltz, representing the United States, is responsible for investigating allegations of unlawful activity by former Secretary of Agriculture Alphonso Michael Espy. Sun-Diamond Growers of California is a large agricultural cooperative owned by several individual member cooperatives. As a result of the Government's investigation, Sun-Diamond was charged with giving unlawful gratuities to Secretary Espy, committing wire fraud, and making illegal campaign contributions. App. 2.

Linking Sun-Diamond and Secretary Espy was Richard Douglas. As Sun-Diamond's vice president for corporate affairs, Douglas was responsible for (among other things) representing the interests of the corporation and its member cooperatives in Washington. Given Sun-Diamond's business, the Department of Agriculture ("USDA") was naturally part of his bailiwick. According to performance evaluations signed by Sun-Diamond's president, Douglas was a diligent and able representative. Douglas once described his approach to lobbying by paraphrasing Lord Palmerston: "We have no permanent friends or permanent enemies, only a permanent interest in Sun-Diamond Growers of California." Permanent friends aside, he had a long-time friend in Secretary Espy — the two had gone to college together. App. 2. At trial, Sun-Diamond's principal defense to the unlawful gratuity charges was that the gifts provided to Espy fell outside the scope of § 201(c) because they were given out of friendship. Sun-Diamond, of course, as a corporation and the actual defendant in this case, could make no claim to "personal friendship" with Secretary Espy.

Count I of the indictment charged Sun-Diamond with giving Secretary Espy approximately $5,900 in unlawful

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(citing § 594(a)(9) as an example)); *see also Morrison v. Olson*, 487 U.S. 654 (1988) (Independent Counsel, petitioner in the case, appeared *pro se*).

gratuities: tickets to the 1993 U.S. Open Tennis Tournament worth $2,295, luggage worth $2,427, meals worth $665, and a framed print and crystal bowl worth $524. The indictment further alleged that Sun-Diamond treated the costs of these gifts to Secretary Espy as business expenses. App. 4. Count II charged Sun-Diamond with paying $3,100 for Secretary Espy's girlfriend to accompany him to the International Nut Conference in Athens, Greece. App. 4 n.1; *id.* at 36.

The indictment detailed two specific issues on which Sun-Diamond had a clear interest in obtaining favorable action from Secretary Espy. App. 3. The first was the market promotion program ("MPP"), a grant fund administered by USDA and designed to promote U.S. agricultural exports. The Secretary of Agriculture was authorized to allocate MPP money to trade organizations like Sun-Diamond, that would in turn use it to defray overseas marketing expenses. Between 1990 and 1995, the Sun-Diamond member cooperatives received $23.9 million from MPP. In August 1993, Congress enacted budget legislation requiring the Secretary to give preference to "small-sized entities" in disbursing MPP funds. Sun-Diamond and its members were hardly mom-and-pop organizations — they reported net sales of $648 million for fiscal year 1993 — but many of their constituent growers were quite modest in size. Sun-Diamond therefore wanted the Secretary to adopt a regulatory definition of "small-sized entities" that would include cooperatives such as its members. App. 3-4.

Sun-Diamond also took an interest in federal regulation of methyl bromide, a pesticide used by some of the growers who belonged to Sun-Diamond's member cooperatives. In late 1992, the Environmental Protection Agency began review of a proposal to phase out the use of the chemical in the United States because of its potential to contribute to ozone depletion. The evidence presented at trial showed that Sun-Diamond wanted Secretary Espy to help persuade the EPA to delay or reject the proposed phase-out. App. 4.

2. Sun-Diamond moved to dismiss the unlawful gratuity counts in the indictment on several grounds. *See* App. 37-53. Pertinent to this petition, Sun-Diamond argued that the indictment was defective because it failed to allege a nexus between the gratuities given to Secretary Espy and specific official acts the Secretary performed. App 38-39. The District Court rejected Sun-Diamond's argument, declaring that "[t]his District Court and the various federal courts of appeal that have addressed this precise issue have concluded that the gratuity statute does not require such nexus . . ." App 42. Instead, the District Court concluded that an indictment is sufficient if it alleges that the giver of the gratuity has matters "within the purview of the official receiving the gratuity" *and* the gratuity was given because of the official's position. *Id.* The District Court further opined that its reading of the statute was consistent with D.C. Circuit precedent and the decisions of other circuits that "have similarly given Section 201(c) a broad interpretation." App 45.

Following a trial, the District Court extensively instructed the jury regarding the unlawful gratuity counts under § 201(c)(1)(A). *See* App. 67-90. The instructions in several places repeated verbatim the statutory language that, in order to convict, the gratuities must have been given to Secretary Espy by Sun-Diamond "for or because of official acts" that the Secretary either had performed or might perform in the future. App. 82-89. The instructions also stated in several places that, if the jury found that Sun-Diamond was motivated to give the gratuities to Secretary Espy because of his official position as the Secretary of Agriculture, then it could convict under § 201(c)(1)(A). App. 82-89. The complete § 201(c)(1)(A) jury instructions are set forth as Appendix D. With respect to the unlawful gratuity charges, the jury convicted Sun-Diamond on Count I (gratuities given directly to Secretary Espy), but acquitted on Count II (payment for the Secretary's girlfriend to travel with him).

3. On appeal, Sun-Diamond challenged its conviction on Count I, renewing its argument that the unlawful gratuity statute requires the government to prove a nexus between each unauthorized gift and some specifically identified official act — performed or hoped to be performed — for which the payment or gift was given. Because the indictment failed to allege any such one-to-one relationship, Sun-Diamond contended, the district court erred in denying Sun-Diamond's motion to dismiss Count I. App 4. In a narrower variation on that argument, Sun-Diamond also challenged the jury instructions on Count I, arguing that the instructions impermissibly allowed the jury to convict if it found that Sun-Diamond gave Secretary Espy things of value merely in recognition of his *official position*, regardless of official acts that might have supplied the motivation. App 5. The D.C. Circuit purported to reject Sun-Diamond's broader challenge to the indictment but agreed with Sun-Diamond's challenge to the jury instructions. *Id.*

In the D.C. Circuit's view, the district court charged the jury in full accord with the theory that gifts motivated by an official's status or position run afoul of the unlawful gratuity statute, regardless of whether the donor had any intent to affect or reward official conduct. *Id.* Quoting selectively from the jury instructions, the Court of Appeals emphasized those instructions that focused on or mentioned the gratuity recipient's official status. App 5-7. The Court opined that the language of the jury charge was far broader than that of the statute. App 7. According to the D.C. Circuit, to satisfy the criminal intent requirement embodied in the phrase "for or because of any official act," the giver must intend either to reward some past concrete official act or acts, or to enhance the likelihood of some specific, favorable future act or acts. *Id.* Relying on its prior decision in *United States v. Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974), the Court distinguished the crime of bribery from the crime of giving an unlawful gratuity as follows:

> The bribery section makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act.

App. 7-8. The Court opined that,

> As [*Brewster*] makes tolerably clear, to say that the gratuity provision lacks a *quid pro quo* requirement is not to read the "official act" language out of the statute. It is only to say that, in contrast to bribery, the gratuity and the official act need not each motivate the other. But the gratuity statute by its terms does still require at least a unidirectional relationship--the gift must be "for or because of" the act.

App. 8. The Court then observed that

> The relation may be simply one of reward. * * * Even in such a case, the giver presumably hopes that his gratuity will affect the recipient's future conduct — and this was undoubtedly the concern that motivated Congress to bring rewards for past acts within the coverage of the statute. But, in contrast to bribery, it is enough under the gratuity statute if the defendant gives an unpromised benefit for a past governmental favor. And, whatever degree of intent to influence may be necessary for a bribe, a gift looking to future acts can be an unlawful gratuity where the giver is motivated simply by the desire to increase the likelihood of one or more specific, favorable acts.

Id.

The Court of Appeals acknowledged that its decision in *Brewster* was perhaps distinguishable, because it involved

campaign contributions to a Senator and, therefore, implicated the First Amendment. App 9. The Court also acknowledged that in a footnote in *Brewster* it left open the question of what standard would be appropriate when applying the unlawful gratuity provision to appointed officials, an issue it later addressed in *United States v. Campbell*, 684 F.2d 141 (D.C. Cir. 1982). App. 9. The Court, however, read its decision in *Campbell* — which involved free moving services given to a superior court judge by a company that he had treated remarkably leniently with respect to its more than 1,000 traffic tickets — to require proof that the defendant's intent was more than some vague hope of inducing warm feelings toward the donor. *Id.* Thus, the D.C. Circuit concluded that if Sun-Diamond "furnished Espy with gifts merely to win his generalized sympathy for Sun-Diamond, those gifts would not be illegal gratuities, unless the jury could find that [Sun-Diamond through] Douglas sought this generalized sympathy to influence Espy to perform one or more official acts sometime in the future." App. 10.

The Court of Appeals acknowledged that its reading of § 201(c)(1)(A) is in conflict with the prevailing interpretation in the Circuits, which is that payments or gifts motivated by the recipient's official position, at least when the official is in a position to make decisions affecting the giver, may be unlawful gratuities. App 11-12 (citing *United States v. Evans*, 572 F.2d 455, 480 (5th Cir. 1978); *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979) (*en banc*); *United States v. Umans*, 368 F.2d 725, 730 (2d Cir. 1966); *United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir. 1995); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976)). The Court summarily rejected that interpretation, observing simply that

> [t]hese decisions appear to leap from the gratuity statute's lack of a reciprocal *quid pro quo* requirement to an assumption that it has dispensed with any need to show intent focused on an official act or acts. * * * Any such leap disregards the explicit language of the statute and contradicts *Brewster* and *Campbell*.

App. 11-12.[2]

Following its rejection of the prevailing interpretation, the D.C. Circuit concluded that

> the jury instructions [in this case] invited the jury to convict on materially less evidence than the statute demands — evidence of gifts driven simply by Espy's official position. The difference may not seem very great, for whenever a donor has matters actually or potentially pending before his donee, gifts motivated by the latter's position will usually also be motivated by a desire to reward or elicit favorable official action. But the terms of the statute require a finding that the gifts were motivated by more than merely the giver's desire to ingratiate himself with the official generally, or to celebrate the latter's status.

App. 12-13. The Court rejected any argument that the jury instructions as a whole accurately reflected the "for or because of any official act performed or to be performed" language of the statute even though numerous times the instructions repeated that language verbatim, finding that such

> recitations could not possibly, however, have overcome the broader message. Thus the charge failed to give the jury an adequate understanding of the issues, and the error cannot be called technical or harmless.

App. 13 (internal citations omitted).

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[2] The D.C. Circuit pointed to two decision that it described as "out-of-circuit cases [that] seem to take the official act requirement more seriously." App. 12 (citing *United States v. Muldoon*, 931 F.2d 282 (4th Cir. 1991), and *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996)). These cases are addressed below.

Finally, the D.C. Circuit purported to reject Sun-Diamond's argument that the Government is required to prove a nexus between a gratuity and a specific past or future official act in order to sustain a conviction under § 201(c)(1)(A). App 13-14. The Court concluded that a similar argument had been made in *United States v. Campbell* but was rejected there. In the D.C. Circuit's words, the Government is not required to prove a nexus between specific official acts and the gratuity, only "the requisite intent to reward past favorable acts or to make future ones more likely." *Id.*

4. On June 18, 1998, the panel denied the Government's petition for rehearing.[3] App. 32. On the same date, the Circuit denied the suggestion for rehearing *en banc*. App. 33. As noted previously, Judge Wald (not a member of the panel deciding this case) issued an opinion concurring in the denial of the suggestion for rehearing *en banc* precisely to highlight the circuit split and the need for Supreme Court review:

> I find the interpretation of 18 U.S.C. 201(c)(1) (A) (1994) so as not to cover any gifts or gratuities made by a regulated company to high officials of the regulating agency troubling. Given the choice, I would have construed the statutory prohibition as the Fifth Circuit has done. However, I have concluded that calling for a vote on the *en banc* petition would be futile in this case. The current circuit split calls for Supreme Court attention.

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[3] The Government cited in its petition for rehearing this Court's decision in *Standefer v. United States*, 447 U.S. 10 (1980) as supporting the Government's interpretation of 18 U.S.C. § 201(c)(1)(A). Although the panel denied the petition without opinion, it subsequently responded to the Government's reliance on *Standefer* by adding new footnote #5 to its original opinion at 138 F.3d 961. That footnote is addressed in Part II of this Petition.

App. 34 (internal citations omitted). According to Judge Wald,

> [t]he ephemeral distinction between bestowing gifts and gratuities on a high government official who has regulatory jurisdiction over the giver solely because of that official's 'position,' rather than in the hopes of obtaining a favorable attitude in any future regulatory act, may commend itself to lawyers and judges, but I suspect it would not pass the 'snicker test' with laymen.

Id. Judge Wald then candidly "admit[ted] that the main distinction the panel draws between gifts motivated by an official's 'position' and gifts motivated by an official's 'acts' eludes me altogether," *id.*, concluding instead that "inherent in an official's 'position' is his capacity to perform regulatory acts which will affect the gift-giver." *Id.*

REASONS FOR GRANTING THE WRIT

I. The District Of Columbia Circuit's Interpretation Of 18 U.S.C. § 201(c)(1)(A), A Statute That Prohibits The Giving Of Unlawful Gratuities To Federal Officials, Creates An Acknowledged And Irreconcilable Split Of Authority In The Federal Courts Of Appeal

The District of Columbia Circuit rejected the interpretation of the unlawful gratuity statute that prevails in the Circuits, that the statute prohibits gratuities paid to federal officials who are in a position to take official action that could benefit the giver. Instead, the D.C. Circuit requires something more — specifically, proof that ties the gratuity to past or future official acts of the federal official. In other words, the D.C. Circuit rejected an interpretation of the statute that would prohibit the giving of gratuities to gain the generalized goodwill of a federal official before whom the gift giver had matters pending. *See* App. 10 ("if Douglas furnished Espy with gifts merely to win his generalized

sympathy for Sun-Diamond, those gifts would not be illegal gratuities, unless the jury found that Douglas sought this generalized sympathy to influence Espy to perform one or more official acts sometime in the future"). Although the Court insisted that it was not requiring the Government to prove a nexus between a specific official act and the gratuity, it is not clear how else, under the standard the Court adopted, the Government can prove that a gratuity was unlawful under § 201(c)(1)(A).

As the D.C. Circuit expressly acknowledged, its restrictive view of the statute's scope creates an irreconcilable split of authority in the federal courts of appeal. App. 11-12. This conflict pits the D.C. Circuit — the seat of the federal government — against several other circuits, including at least the Second, Third, Fifth and Ninth Circuits. In fact, it appears that in most circuits other than the District of Columbia, Sun-Diamond's § 201(c)(1)(A) unlawful gratuity conviction in this case would be sustained. Astonishing as it may seem, the D.C. Circuit's decision in this case means that a gratuity that would be a federal crime if given to a minor federal official in the Second, Third, Fifth or Ninth Circuits might be considered perfectly legal if given to a Cabinet Secretary in Washington, D.C. In light of the extreme public importance of the gratuity statute in maintaining governmental integrity and the sharp split of authority in the circuits, this case warrants the Court's immediate attention.

A. The D.C. Circuit's Decision In This Case Creates A Significant Split Of Authority On An Important Issue Of Federal Law

1. The D.C. Circuit candidly acknowledged that its interpretation of § 201(c)(1)(A) creates a significant circuit split on the scope of the unlawful gratuity statute. App. 11-12; *see also* App. 34 (Wald, J., concurring in the denial of suggestion for rehearing *en banc*) ("The current circuit split calls for Supreme Court attention"). Indeed, the D.C. Circuit itself pointed to decisions from four other circuits that conflict

with its decision in this case. *See* App. 11. The D.C. Circuit flatly rejected the interpretations of § 201(c)(1)(A) that those and other circuits have expressly adopted.[4] Relying on the "for or because of any official act performed or to be performed" language of the statute, the D.C. Circuit simply observed that:

> These decisions appear to leap from the gratuity statute's lack of a reciprocal *quid pro quo* requirement to an assumption that it has dispensed with any need to show intent focused on an official act or acts. Thus, the court in *Bustamante* says "Generally, no proof of a *quid pro quo* is required: it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office." Any such leap disregards the explicit language of the statute and contradicts *Brewster* and *Campbell*.

App. 11-12 (internal citation omitted).

2. Even a brief review of § 201 unlawful gratuity decisions from other circuits confirms that the D.C. Circuit's decision in this case distances it from the prevailing interpretation. Some circuits have adopted the interpretation of the statute that the district court in this case endorsed: that the statute applies if the giver of the gratuity has matters "within the purview of the official receiving the gratuity" and the gratuity was given because of the official's position. *See* App. 42. These decisions recognize, as Judge Wald did in this case, *see* App. 34, the

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[4] *See, e.g., United States v. Umans*, 368 F.2d 725, 730 (2d Cir. 1966); *United States v. Barash*, 412 F.2d 26, 29 (2d Cir. 1969); *United States v. Niederberger*, 580 F.2d 63, 68-69 (3d Cir. 1978); *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979) *(en banc), afield*, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455, 481 (5th Cir. 1978); *United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir. 1995); *United States v. Gorman*, 807 F.2d 1299, 1304 (6th Cir. 1986); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976). All of these decisions are discussed below.

realities of the motivations of a regulated entity bestowing favors on its regulator.

For instance, in *United States v. Niederberger*, 580 F.2d 63 (3d Cir. 1978), the Third Circuit rejected any attempt to impose a requirement that the Government prove a nexus between a gratuity and particular official acts.[5] The defendant in *Niederberger* was an Internal Revenue Service ("IRS") agent who was prosecuted for accepting free golf trips from an official of a company the IRS agent was responsible for auditing. The defendant argued that the Government was required to prove that he accepted the gratuities in exchange for specific official acts, but the Third Circuit rejected that proposition in no uncertain terms:

> Thus, we find it unnecessary for the Government to allege in an indictment charging [an unlawful gratuity] offense that a gratuity received by a public official was, in any way, generated by some specific, identifiable act performed or to be performed by the official. A *quid pro quo* is simply foreign to the elements of a [gratuity] offense. What is proscribed, simply put, is a public official's receipt of a gratuity, to which he was not legally entitled, given to him in the course of his everyday duties, for or because of any official act performed or to be performed by such public official, *and he was in a position to use his authority in a manner which could affect the gift-giver.*

580 F.2d at 68-69 (emphasis added).

In *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976), the Ninth Circuit endorsed a reading of § 201 that

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[5] Several of the older unlawful gratuity cases refer to §§ 201(f) and (g), which were the predecessors to the current § 201(c). Section 201(f) prohibited the giving of unlawful gratuities, while § 201(g) prohibited the receipt of such gratuities. The operative language of the statutory prohibitions, however, remains substantially unchanged between those original provisions and the current § 201(c).

prohibits the giving of gratuities to a federal official who the defendant knows is in a position to use that authority to benefit the giver, even if there is no proof of specific — or indeed any — such acts actually ever performed. The defendant in *Alessio* paid vacation expenses of the administrator of a federal prison camp in which the defendant's father was incarcerated. The defendant argued that the Government had failed to prove that such gratuities were linked to any official acts of the camp administrator, but the Ninth Circuit held that no such proof was required. Instead, the court upheld the conviction because the "jury could properly conclude from the testimony at trial that [the defendant] knew [the camp administrator] was *in a position to use his authority* in a manner which would affect the conditions of confinement of [the defendant's] father." 528 F.2d at 1082 (emphasis added). *See also United States v. Strand*, 574 F.2d 993, 995 n.2 (9th Cir. 1978) (affirming bribery conviction of Customs Service official who accepted $800 to permit person he believed to be carrying illegal drugs to cross Canadian border into U.S., and observing that bribery is different from an unlawful gratuity in that the latter "require[s] only that the thing of value be given or accepted 'otherwise than as provided by law for the proper discharge of official duty'").

Similarly, in *United States v. Evans*, 572 F.2d 455, 481 (5th Cir. 1978), the Fifth Circuit emphasized that it is the giving or acceptance of gratuities because of the official's position that is prohibited by § 201. In *Evans*, the defendant was a bank officer who accepted a position in the Department of Health, Education and Welfare. Prior to even officially starting as a federal employee, he received gratuities from persons who were interested in maintaining business relationships with him and possibly obtaining certain federal government contracts with HEW. The defendant argued that the Government had failed to prove that the gratuities were tied to any specific acts and, moreover, that at the time he received them (and afterward) he lacked the authority to perform some official act to benefit the givers.

In affirming his unlawful gratuity convictions, the Fifth Circuit observed that the statute prohibits

> the acceptance by a government official of any extraneous compensation or thing of value for official conduct. More specifically, it is not necessary that the official actually engage in identifiable conduct or misconduct nor that any specific *quid pro quo* be contemplated by the parties nor even that the official actually be capable of providing some official act as *quid pro quo* at the time.

572 F.2d at 479. Rather, the Fifth Circuit emphasized that

> [e]ven if corruption is not intended by either the donor or the donee, there is still a tendency in such a situation to provide conscious or unconscious preferential treatment of the donor by the donee, or the inefficient management of public affairs.

Id. at 480. After reviewing the statute's language and purposes, and considering some of its legislative history, the Fifth Circuit concluded that under the unlawful gratuity subsection "all that need be proven is that the official accepted, *because of his position*, a thing of value 'otherwise than as provided by law for the proper discharge of official duty.'" *Id.* (emphasis added).

Similar to these Circuits, the Sixth Circuit has held that the

> purpose of Section 201(g) [receipt of unlawful gratuities] is to reach all situations in which a government agent's judgment concerning his official duties may be clouded by the receipt of an item of value given to him by reason of his position.

United States v. Gorman, 807 F.2d 1299, 1304 (6th Cir. 1986) (citing *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978)). In *Gorman*, the primary issue was whether certain loans an Assistant United States Attorney had received (and later

repaid) were "things of value" under § 201. The defendant argued that the loans were not "gratuities" in a conventional sense, but the Sixth Circuit flatly rejected the argument, observing that "[c]ontrary to the appellant's argument, there is no authority for the proposition that the items received must be 'gratuities' as that term is commonly understood." 807 F.2d at 1304. Instead, the Sixth Circuit concluded that, "[i]n order to put the underlying policy of the statute into effect," terms such as "'thing of value' must be broadly construed." *Id.*

The Second Circuit also has interpreted the statute similarly to the Circuits previously discussed. For example, in *United States v. Umans*, 368 F.2d 725, 730 (2d Cir. 1966), a certified public accountant made surreptitious cash payments to IRS agents who were auditing the income tax returns of the accountant's clients. The accountant was prosecuted for and convicted of numerous federal crimes, including bribery and giving unlawful gratuities under § 201. On appeal, the Second Circuit affirmed all of the convictions except the unlawful gratuity counts, finding that they were lesser included offenses of the bribery counts. The court declared that the unlawful gratuity statute "only requires proof that payment was made to an agent in a situation where no payment was necessary." 368 F.2d at 728. The Second Circuit further declared that the unlawful gratuity statute "makes it criminal to pay an official a sum which he is not entitled to receive regardless of the intent of either payor or payee with respect to the payment." *Id.* at 730. *See also United States v. Irwin*, 354 F.2d 192, 197 (2d Cir. 1965) (to sustain an unlawful gratuity conviction, the Government must prove the defendant gave the gratuity "knowingly and purposefully and not through accident, misunderstanding, inadvertence or other innocent reasons"); *United States v. Barash*, 412 F.2d 26 (2d Cir. 1969) (affirming § 201 unlawful gratuity conviction of tax attorney who paid IRS auditors, and noting that it made no difference "whether the payments were made because of economic duress, a desire to create a better working atmosphere, or [in] appreciation for a speedy and

favorable audit"); *United States v. Biaggi*, 853 F.2d 89, 101 (2d Cir. 1988) (affirming § 201 unlawful gratuity convictions of former Congressman; citing and quoting *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978) with approval).

3. Some decisions appear to go even further, upholding § 201(c)(1)(A) convictions upon proof that the giver of the gratuity was motivated simply by the federal official's *status* or *position*. For example, soon after its decision in *United States v. Niederberger*, discussed above, in considering the prosecution and conviction of the company official (Standefer) who gave the golf trips to the IRS agent (Niederberger), the Third Circuit *en banc* held that "[a]ll that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of Niederberger's official position, and not solely for reasons of friendship or social purposes." *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979)(*en banc*). That decision, which this Court affirmed, *Standefer v. United States*, 447 U.S. 10 (1980), is the subject of the second section of this petition.

More recently, the Fifth Circuit arguably extended its holding in *Evans* to permit § 201(c)(1)(A) to reach the giving of any gratuity motivated solely by the official's *status* or *position*, without requiring proof that the official had been, is, will or could ever be in a position to take official action that might benefit the giver. In *United States v. Bustamante*, 45 F.3d 933 (5th Cir. 1995), the Fifth Circuit affirmed the § 201 unlawful gratuity convictions of a former Congressman who accepted loan guarantees from a private person in connection with his participation in an effort to seek a television station license from the Federal Communications Commission. There was no evidence that the defendant in any way actually engaged in any conduct designed to influence the awarding of the license, nor that he had any authority to do so.

The Fifth Circuit upheld the convictions, relying on *Evans*. The court reiterated that, in order to establish an unlawful gratuity offense under § 201, "it is sufficient for the

government to show that the defendant was given the gratuity simply because he held public office." 45 F.3d at 940. Furthermore, the court declared that "the jury need not find that the official accepted the gratuity with the intent to be influenced. The jury must only conclude that the evidence establishes beyond a reasonable doubt that the official accepted unauthorized compensation." *Id*. The defendant in *Bustamante* filed a petition for a writ of certiorari, which this Court denied. *Bustamante v. United States*, No. 95-60, 516 U.S. 973 (1995).

4. Other Circuits, including the First and Fourth Circuits, which the D.C. Circuit cited as supporting its interpretation of the statute, either have expressly left the issue undecided, or appear not to have considered it directly. For example, in *United States v. Previtte*, 648 F.2d 73 (1st Cir. 1981), the First Circuit addressed and rejected a challenge to an unlawful gratuity conviction under § 201, finding that there was no plain error in the jury instructions (the defendant did not object at trial). In response to the defendant's argument that the government had failed to prove that the gratuity was given for or because of an official act, the First Circuit observed:

> The government points out that it is not required to prove that any such official act actually occurred, and argues in addition that in a gratuity prosecution, unlike a bribery prosecution, it need prove no causal relation to any "specific, identifiable act performed or to be performed by the official." We need not decide whether this last point is correct or not, because of our conclusion that the instruction given in this case does not constitute plain error under either standard.

648 F.2d at 82 n.8. The First Circuit more recently noted the issue again in a case involving a Massachusetts unlawful gratuity statute worded similarly to § 201, but concluded that "[t]his is not the proper case for us to decide the federal issue." *United States v. Sawyer*, 85 F.3d 713, 738 (1st Cir.

1996). *See also United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991) (no occasion to directly address the issue because the defendant had been convicted of bribery as well as unlawful gratuity offense and *conceded* that evidence was sufficient to prove gratuity offense).

Some Circuits have made general, but relatively unilluminating, statements about the scope of § 201(c)(1)(A) in cases where the question presented here was not directly under consideration. For example, in *United States v. Patel*, 32 F.3d 340 (8th Cir. 1994), the Eighth Circuit affirmed the unlawful gratuity conviction of a defendant who offered $50,000 to federal officials during his efforts to buy a hotel from the Resolution Trust Corporation. (Defendant's plans went awry when the official receiving the offer reported it to the FBI.). The district court instructed the jury that, in order to find the defendant guilty under § 201(c)(1)(A), the following three things had to be proven: (1) that the defendant offered something of value to the federal official; (2) that at the time the donee was a federal official; and (3) that the defendant made the offer because the official performed or was going to perform an official act for him. 32 F.3d at 344-45. Reviewing the instructions only for plain error -- because the defendant did not properly object at trial — the Eighth Circuit concluded that they closely paralleled the statute's language and fell "well within the district court's discretion to choose the language that will formulate the charge." *Id.* at 345. *See also United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980) (it is the "element of *quid pro quo* that distinguishes the heightened criminal intent requisite under the bribery sections of the statute from the simple *mens rea* required for violation of the gratuity sections").

5. Ultimately, there is no dispute that the D.C. Circuit, probably the most important circuit for the enforcement of the unlawful gratuity prohibition, has interpreted the statute differently and more leniently than virtually every other circuit. Nor is there any dispute that Sun-Diamond's

conviction under § 201(c)(1)(A) in this case would be sustained in at least five, if not all, of the other circuits. At a minimum, the jury instructions in this case required, the Government in this case proved, and the jury in this case found, that Sun-Diamond (1) provided gratuities to Secretary Espy while matters of interest to Sun-Diamond were pending before the Secretary, and (2) did so because of Espy's position and authority as the Secretary of Agriculture. By virtue of the circuit split alone, this case merits plenary review.

B. The D.C. Circuit's Decision Seriously Undermines The Enforcement Of An Important Federal Criminal Statute Designed To Promote Government Integrity

1. At issue ultimately in this case is whether a large agricultural cooperative, regulated by the federal government, may lavish gifts upon the Secretary of Agriculture and yet escape prosecution under the unlawful gratuities statute. The D.C. Circuit's decision permits such conduct unless the Government is able to prove the virtual equivalent of a bribe. A construction of the statute that eliminates the distinction between bribes and unlawful gratuities is contrary to the significantly different language of the two statutes,[6] Congress' clear intent to create two separate offenses,[7] and the

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[6] *See, e.g.*, Department of Justice, *United States Attorneys Manual* § 9-85.101 (Sept. 1997) ("Section 201 of Title 18 is entitled 'Bribery of public officials and witnesses.' The statute comprises two distinct offenses, however, in common parlance only the first, codified in section 201(b) of the statute is true 'bribery.' The second offense, codified in section 201(c), concerns what are commonly known as 'gratuities,' although that word does not appear anywhere in the statute.").

[7] *See, e.g., Note, Campaign Contributions And Federal Bribery Law*, 92 Harv. L. Rev. 451, 451 (1978) ("The federal bribery statute specifies two offenses that may be committed by public officials who receive contributions: bribery and gratuity"); *id.* ("The statutory definition of the gratuity offense . . . does not expressly require proof of corrupt intent or proof that value was given specifically in return for performance by the

longstanding judicial interpretation of § 201 as creating two separate offenses.[8] Moreover, the D.C. Circuit's interpretation presents a serious obstacle to the federal prosecution of official corruption and the restoration of public confidence in governmental integrity.[9]

Effectively, the D.C. Circuit held that, unless the United States proves that a defendant gave gratuities to a government official either to reward that official for specific past official acts, or with the intent to increase the likelihood of future acts, there can be no conviction under § 201(c)(1)(A), because there would be no proof that the defendant acted "for or because of any official act performed or to be performed." App. 7. The Circuit rejected the interpretation of the other circuits that a violation of the statute is established by proof that the gratuity was given to an official who was in a position to take official actions that could benefit the giver.

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official"); Daniel H. Lowenstein, *Political Bribery And-The Intermediate Theory Of Politics*, 32 U.C.L.A. L. Rev. 784, 796 (1985) ("the elements of bribery should be contrasted with those of a lesser offense that exists in federal law and in some states: giving or receiving an unlawful gratuity"); Joseph R. Weeks, *Bribes, Gratuities and the Congress: The Institutionalized Corruption Of The Political Process, The Impotence Of Criminal Law To Reach It, And A Proposal For Change*, 13 J. Legis. 123, 127 (1986) (observing that 18 U.S.C. § 201 prohibits both bribes and unlawful gratuities); *id.* at 132 (chart contrasting elements of the two offenses); Charles N. Whitaker, Note, *Federal Prosecution Of State And Local Bribery: Inappropriate Tools And The Need For A Structured Approach*, 78 Va. L. Rev. 1617, 1621-22 (1992) (discussing the difference between bribery and unlawful gratuity offenses under federal law).

[8] *See United States v. Irwin*, 354 F.2d 192, 197 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); Note, 92 Harv. L. Rev., supra note 7, at 456 n.29 (since at least 1965, the federal courts have recognized two separate offenses under § 201).

[9] *See, e.g.*, Weeks, 13 J. Legis., *supra* note 7, at 136-38 (criticizing the D.C. Circuit's judicial imposition of a requirement of proof of a nexus between a gratuity and specific official act, arguing that such a construction is not supported by § 201's text, legislative history, or purpose, and that the D.C. Circuit's interpretation generally has frustrated "what should be routine convictions for corruption." *Id.* at 137).

2. The D.C. Circuit's decision in this case has potentially disastrous practical consequences. In many instances, it may make an unlawful gratuity under § 201(c)(1)(A) virtually indistinguishable from a bribe, a considerably more serious offense that is already covered by a separate statutory provision with far stiffer penalties (up to 15 years imprisonment for bribery, compared to a maximum of 2 years for unlawful gratuities). The House Report that accompanied the original § 201 provisions in 1961 clearly indicates that Congress contemplated the offense of giving or receiving an unlawful gratuity to be something less than a bribe. In describing the unlawful gratuity offense, the Report declares that "[t]he conduct which is forbidden has the *appearance* of evil and the capacity of serving as a cover for evil." H.R. Rep. No. 748, at 19 (July 20, 1961) (emphasis added).

Under the D.C. Circuit's decision, however, when a gratuity is given in anticipation of future official action, an unlawful gratuity conviction will be sustained only if the Government proves that the defendant acted with the intent to increase the likelihood of an official act. As a practical matter, it is difficult to see how the D.C. Circuit's view of an unlawful gratuity is really any different than proof that the giver had the intent to influence an official act, which is an element of bribery. Because no other circuit requires proof of this level of criminal intent, the D.C. Circuit's decision has the undesirable result that the most restricted and limited enforcement of the unlawful gratuity statute in this country will occur in the District of Columbia, our nation's capital.[10] The end result is that it may be easier for regulated entities to bestow largesse on Cabinet Secretaries without fear of criminal prosecution than it would be to provide small gifts to

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[10] "Ethics experts have characterized the lower court case [*United States v. Sun-Diamond Growers of California*] as one of the most important corruption verdicts in recent history." Federal Ethics Report, at 9 (May, 1998).

minor officials far down a Department's hierarchy who are located in a different circuit.[11] Another irony is that Cabinet Secretaries, who deal with issues of national scope and regularly travel across the country in performing their official duties, as well as those regulated entities that might provide favors to such officials, may be subject to different standards for gratuities, depending on where a gratuity is given or received. The rules governing the conduct of Cabinet Secretaries and other federal officials should be uniform, and not an accident of venue.

II. The D.C. Circuit's Decision Is Arguably Inconsistent With A Prior Decision Of This Court

1. In *Standefer v. United States*, 447 U.S. 10 (1980), this Court arguably endorsed a broader interpretation of § 201 than the D.C. Circuit adopted in this case.[12] Among other charges, Standefer was convicted of four counts of violating § 201's unlawful gratuity prohibition by providing free golf trips to an IRS agent who was auditing Standefer's company.

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[11] These sorts of incongruities were part of what Congress intended to eliminate when it overhauled the federal bribery and conflict of interest statutes by creating § 201 in the early 1960s. In the same House Report concerning § 201 discussed above, the House Committee on the Judiciary, while addressing reasons for a new comprehensive conflict of interest law, observed that "[l]iterally read, existing law thus makes it a crime punishable by fine and imprisonment for a postal clerk to assist his mother in filing a routine claim for a tax refund, but does not prohibit a Cabinet officer from seeking to influence an independent agency to award a license for a valuable television station to do a business venture in which he shared the profits." H.R. Rep. No. 748, 87th Cong., 1st Sess., at 4 (July 20, 1961).

[12] As pointed out in footnote 5 above, at the time *Standefer* was decided, the unlawful gratuity prohibitions were contained in § 201(f) (prohibiting the *giving* of such gratuities) and § 201(g) (prohibiting the *receipt* of such gratuities). Thus, although the opinions and briefs in *Standefer* refer to § 201(f), they are addressing the same provision and language at issue in this case.

Standefer's defenses included that the gifts in fact had no influence on the outcome of the audits and that he gave the trips out of friendship, with no intent to influence or reward any official acts of the IRS agent. Both initially, and in response to a question from the jury regarding criminal intent under § 201, the District Court instructed the jury that a conviction could be sustained if it found that Standefer gave the trips because of the IRS agent's official position, and not simply out of friendship.

On appeal, Standefer challenged the jury instructions on several grounds, including some similar to the position the D.C. Circuit adopted in *Sun-Diamond*, *i.e.*, that the instructions permitted a conviction without proof that Standefer gave the gratuities as a reward for or to influence official acts. The Third Circuit, sitting *en banc*, rejected Standefer's argument, declaring that "[a]ll that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of [the IRS agent's] official position, and not solely for reasons of friendship or social purposes." *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979) (*en banc*).

2. In this Court, Standefer petitioned for review of several issues, including that the Third Circuit's decision incorrectly "allow[ed] the charge of the court below to eliminate from the consideration of the jury the correctness of returns audited by the Internal Revenue Service agent in determining the issue of intent where the jury after deliberation asked the court whether intent was to be considered in its deliberations." Petition for a Writ of Certiorari in No. 79-383, *Standefer v. United States*, at 3-4.[13]

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[13] This petition cites the petition for certiorari, merits briefs, and appendix filed in this Court in *Standefer v. United States*, 447 U.S. 10 (1980). These documents are available through LEXIS, but LEXIS does not assign electronic database citations to them. The documents can be located through a search in the LEXIS "Genfed" library, "Briefs" file, using the search "Number (79-383)".

In the petition, Standefer also argued that the question was "whether Standefer had a corrupt intent in providing the golf trips or if the golf trips were provided for business friendship." *Id.* at 20. This Court granted certiorari on all issues presented in Standefer's petition. 444 U.S. 1011 (1980).

In their briefs on the merits, both Standefer and the United States addressed the proper interpretation of § 201. In his opening merits brief, Standefer argued that the District Court's § 201 instructions were erroneous because they stated that the IRS agent's

> position as an IRS agent in charge of the Gulf Oil audits made him a person whose actions were official acts under the statute and took away from the consideration of the jury the issue of corrupt intention. The charge that it was sufficient if the payments were paid for any reason in connection with the audits was tantamount to a directed verdict of guilty and did not consider the defense that the golf trips were taken for friendship and were not within the purview of the meaning of the criminal statutes.

Br. of Pet., No. 79-383, *Standefer v. United States*, at 42. The United States responded that the jury instructions were correct because § 201 is "designed to prevent officials from being tempted by unauthorized compensation--even if in particular circumstances the temptation is resisted." Br. of U.S., No. 79-383, *Standefer v. U.S.*, at 60.

In a section of his reply brief entitled, "IV. LEGISLATIVE HISTORY OF 18 U.S.C. § 201(f) RE INTENT", Standefer addressed the legislative history of § 201, and argued that the "for or because of" official acts language in the statute's unlawful gratuity provision "was aimed at rewards for an official act," not the mere "receipt of gifts." Rep. Br. of Pet., No. 79-383, *Standefer v. United States*, at 9-11. Standefer then relied on the D.C. Circuit's

decision in *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974), arguing that *Brewster* correctly interpreted § 201 to require proof of the gratuity "'being made because of a specifically identified act, and with a certain guilty knowledge . . . .'" Rep. Br. at 11-13 (quoting from *Brewster*). Although his briefs are not completely clear on these points, and Standefer appears to have been raising multiple, intermingled arguments regarding the intent required for a § 201 conviction, the essence of Standefer's position in this Court appears to have been that the District Court's jury instructions were erroneous because they neither required proof of any particular official act that Standefer intended to reward or influence, nor that he had "corrupt intent" in providing golf trips to the IRS agent.

In its opinion, this Court gave short shrift to Standefer's arguments regarding the proper interpretation of § 201. The Court expressly affirmed the Third Circuit's decision in a footnote, declaring that "Petitioner also challenges the instructions to the jury on criminal intent. We agree with the Court of Appeals that the instructions were correct." *United States v. Standefer*, 447 U.S. 10, 14 n.8 (1980). This Court's decision regarding the jury instructions, although limited to a two-sentence footnote, was a holding, not dicta.

3. On June 18, 1998, the D.C. Circuit denied the United States' petition for rehearing in this case without an opinion and without commenting on this Court's decision in *Standefer*. App. 32. At or about the same time, however, the panel, without notice to the parties, apparently amended its original opinion in this case by instructing West Publishing to add a new footnote addressing *Standefer*. The new footnote, footnote 5 in the bound volume containing the opinion (138 F.3d 961), dismisses *Standefer* for two reasons. First, the D.C. Circuit opined that the only § 201 issue in *Standefer* was whether the Government is required to prove a *quid pro quo* in an unlawful gratuities case. App. 11 n.5. Second, the Circuit further opined, without explanation, that the jury

instructions in *Standefer* "were far narrower than the charge in this case." *Id.* Neither proposition is correct.

As set forth above, Standefer's arguments regarding the intent required under § 201 to sustain an unlawful gratuity conviction included, but were by no means limited to, a *quid pro quo* requirement. He also argued that he gave the IRS auditor the golf trips solely out of friendship, and not for any improper purpose. This is the theory of the case to which the Third Circuit was responding when it observed that "[a]ll that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of [the IRS agent's] official position, and not solely for reasons of friendship or social purposes." 610 F.2d at 1080. Moreover, in this respect, several of the jury instructions given in *Standefer* were comparable to the instructions given in this case. For example, the jury in *Standefer* was instructed

> [I]t is sufficient if these payments were paid for any reason in connection with the audit, because of a desire to create a better working atmosphere, or appreciation for a speedy or favorable audit, and that any of these would be purposes that whether the returns were correct or not is not relevant in this case. But it has to be for the purpose of giving these things to the agent on account of these returns and his position with respect thereto.

Appendix, No. 79-383, *Standefer v. United States*, at 50. Thus, *Standefer* is not irrelevant to this case, although additional guidance from this Court with respect to the meaning of § 201(c)(1)(A) is sorely needed at this time.

CONCLUSION

The D.C. Circuit's decision in this case creates a significant and acknowledged circuit split on the interpretation of an important federal criminal statute, and arguably is contrary to a decision of this Court. The unfortunate result of the D.C. Circuit's decision is that the law in the District of Columbia, our

nation's capital, is significantly more tolerant of gratuities given to federal officials, including Cabinet Secretaries, than in virtually any other circuit in the country. The United States suggests that this Court should grant plenary review of this case to resolve the circuit split regarding the interpretation of this important statute. The ability of the United States to prosecute the giving and receipt of unlawful gratuities to federal officials is an interest of the highest order.

For the foregoing reasons, the United States respectfully requests that the Court grant certiorari in this case to resolve the circuit conflict and establish the proper interpretation of 18 U.S.C. § 201(c)(1)(A), an important criminal statute that prohibits the giving of unlawful gratuities to federal officials.

Respectfully submitted,

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July 1998

APPENDIX A

UNITED STATES OF AMERICA, Appellee,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA, Appellant.

NO. 97-3072.

United States Court of Appeals,
District of Columbia Circuit.

ARGUED DEC. 11, 1997.

DECIDED MARCH 20, 1998.

Appeal from the United States District Court for the District of Columbia (No. 96cr00193-01).

Eric W. Bloom, Washington, DC, argued the cause for appellant. With him on the briefs were Richard A. Hibey, Michael K. Atkinson and Charles B. Klein.

Theodore S. Greenberg, Deputy Independent Counsel, Alexandria, VA, argued the cause for appellee. With him on the briefs were Donald C. Smaltz, Independent Counsel, Los Angeles, CA, and Charles M. Kagay, Chief Appellate Counsel, San Francisco, CA.

Carter G. Phillips and Griffith L. Green, Washington, DC, were on the brief for amicus curiae American League of Lobbyists.

Before: WILLIAMS, HENDERSON and TATEL, Circuit Judges.

STEPHEN F. WILLIAMS, Circuit Judge:

Sun-Diamond is a large agricultural cooperative owned by individual member-cooperatives including Diamond Walnut Growers, Sun-Maid Growers of California, Sunsweet

Growers, Valley Fig Growers, and Hazelnut Growers of Oregon. It came within the sights of an independent counsel, Donald C. Smaltz, who was responsible for investigating allegations of unlawful activity by former Secretary of Agriculture Mike Espy. The independent counsel charged Sun-Diamond with making illegal gifts to Espy, committing wire fraud, and making illegal campaign contributions.

Linking Sun-Diamond and Espy was the figure of Richard Douglas. As Sun-Diamond's vice president for corporate affairs, Douglas was responsible for (among other things) representing the interests of the corporation and its member cooperatives in Washington. Given Sun-Diamond's business, the Department of Agriculture ("USDA") was naturally part of his bailiwick. According to performance evaluations signed by Sun-Diamond's president, Douglas was a diligent and able representative. He once described his approach to lobbying by paraphrasing Lord Palmerston: "We have no permanent friends or permanent enemies, only a permanent interest in Sun-Diamond Growers of California." Permanent friends aside, he had a long-time friend in Mike Espy-- the two had gone to college together at Howard University and had stayed close in the years since.

The crimes charged to Sun-Diamond grow out of two largely independent stories. One involves illegal gratuities given to Espy while he was Secretary of Agriculture, the other wire fraud and illegal contributions to the congressional campaign of the Secretary's brother, Henry Espy. We save the recitation of facts for the discussion of the distinct legal issues raised by each story.

Sun-Diamond argues that under the facts alleged and proven it could not properly be found guilty of any of the offenses, and, as to the illegal gratuities, that the trial court's charge allowed the jury to convict on a theory precluded by the statute. We disagree with Sun-Diamond's claims of entitlement to dismissal of the indictment and to acquittal, but we agree that the jury charge on the gratuity counts was error and requires a remand for a new trial. Sun-Diamond also

attacks the sentence, saying that the trial judge, having increased the offense level by eight for Espy's high-level status as required by the Guidelines, wrongly bumped it up another two levels on the theory that the Guidelines inadequately took that status into account. It also objects to the trial court's imposition of probationary conditions on Sun-Diamond's member cooperatives, who were neither defendants nor agents of the defendant. We agree with Sun-Diamond on both sentencing points.

* * *

Illegal Gratuities

The key dispute here is over how close a link the government must show between Sun-Diamond's gifts and official acts that the Secretary of Agriculture performed or might perform. The indictment detailed two specific issues on which Sun-Diamond had a clear interest in favorable action by the Secretary. The first was the market promotion program ("MPP"), a grant fund administered by USDA and designed to prop up U.S. agricultural exports. See 7 U.S.C. §5623. The Secretary of Agriculture was authorized to allocate MPP money to trade organizations like Sun-Diamond, who would in turn use it to defray overseas marketing expenses. According to the independent counsel, between 1990 and 1995 the Sun-Diamond member cooperatives received $23.9 million from MPP. In August 1993 Congress enacted budget legislation requiring the Secretary to give preference to "small-sized entities" in disbursing MPP funds. Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, ' 1302(b)(2)(A), 107 Stat. 312, 331 (1993). Sun-Diamond and its members were hardly mom-and-pop organizations--they reported net sales of $648 million for fiscal year 1993--but many of their constituent growers were quite modest in size. Sun-Diamond therefore wanted the Secretary to adopt a regulatory definition of "small-sized entities" that would include cooperatives such as its members.

Sun-Diamond also took an interest in federal regulation of methyl bromide, a pesticide used by some of the growers who belonged to its member cooperatives. In late 1992 the Environmental Protection Agency began review of a proposal to phase out the use of the chemical in the United States because of its potential to contribute to ozone depletion. Although the methyl bromide issue was not technically before USDA, a rational jury could conclude from the trial evidence that Sun-Diamond wanted Espy to help persuade EPA to delay or reject the proposed phase-out.

Count I of the indictment charged the company with giving Espy (via Douglas) around $5,900 in illegal gratuities: tickets to the 1993 U.S. Open Tennis Tournament worth $2,295, luggage worth $2,427, meals worth $665, and a framed print and crystal bowl worth $524.[1] The indictment further alleged that Sun-Diamond reimbursed Douglas for these outlays, treating them as business expenses.

Sun-Diamond challenges Count I, asserting that the gratuity statute, 18 U.S.C. § 201(c)(1)(A), requires the government to prove a nexus between each unauthorized gift and some specifically identified official act--performed or hoped to be performed--for which the gift was given. Because the indictment failed to allege any such one-to-one relationship, contends Sun-Diamond, the district court erred in denying its motion to dismiss Count I. See *United States v. Sun-Diamond Growers of California*, 941 F.Supp. 1262 (D.D.C.1996) (denying motion to dismiss); *United States v. Sun-Diamond Growers of California*, 964 F.Supp. 486 (D.D.C.1997) (denying renewed motion for acquittal). In a narrower variation on this argument, Sun-Diamond also challenges the jury instructions, saying that they impermissibly allowed the jury to convict if it found that Sun-Diamond gave Secretary Espy things of value merely in

[1] Count II charged Sun-Diamond with paying $3,100 for Espy's girlfriend to accompany him to the International Nut Conference in Athens. The jury acquitted on this count.

recognition of his official position, regardless of official acts that might have supplied the motivation. We reject Sun-Diamond's broader argument but agree with its challenge to the jury instructions, and it is with that challenge that we begin.

The gratuity statute provides:

> Whoever . . . otherwise than as provided by law for the proper discharge of official duty . . . directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, *for or because of any official act performed or to be performed* by such public official, former public official, or person selected to be a public official . . . shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(1)(A) (emphasis added).

The statute defines an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

The trial court charged the jury in full accord with the independent counsel's theory that gifts motivated by an official's status or position run afoul of the statute, regardless of whether the donor had any intent to affect or reward official conduct. Indeed, time and again the jury instructions hammered home that theme:

> The gratuity statute makes it a crime for a person or company to knowingly and willingly give a public official a thing of value *because of his official position* whether or not the giver or receiver intended that particular official's acts be influenced.

* * *

The essence of the crime is the official's position of [sic] as the receiver of the payment not whether the official agrees to do anything in particular, that is, not whether the official agrees to do any particular official act in return. Therefore . . . to prove that a gratuity offense has been committed, it is not necessary to show that the payment is intended for a particular matter then pending before the official. *It is sufficient if the motivating factor for the payment is just to keep the official happy or to create a better relationship in general with the official.*

* * *

It is sufficient if Sun-Diamond provided Espy with unauthorized compensation *simply because he held public office.*

* * *

In order for you to convict Sun-Diamond of violating the gratuity statute, you must find beyond a reasonable doubt that Sun-Diamond gave the gifts to Mr. Espy *for or because of Mr. Espy's official government position* and not solely for reasons of friendship or social purpose.

* * *

[T]he government must prove that Sun-Diamond Growers of California, acting through its senior vice president for corporate affairs, Richard Douglas, and knowingly and willingly gave the gratuities, at least in part, *because of the Secretary's position in appreciation of Sun-Diamond Growers of California's relationship with him as a public official or in anticipation of the continuation of its relationship with him as a public official. The*

government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all.

(Emphases added.)

The language of the charge is far broader than that of the statute. To satisfy the criminal intent requirement embodied in the phrase "for or because of any official act," the giver must intend either to reward some past concrete official act or acts, or to enhance the likelihood of some future act or acts. This is the meaning we found in our most extensive sdiscussion of the gratuity statute, *United States v. Brewster*, 506 F.2d 62 (D.C.Cir.1974). In addressing the claim that a violation of the gratuity statute is a lesser included offense subsumed within a violation of the bribery statute, now codified at § 201(b)(1)(A),[2] we necessarily compared the two provisions, explaining that the bribery provision required a more exacting showing of intent. *Id.* at 71-74. We characterized one aspect of the difference as follows:

> The bribery section makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved; the briber is the mover or

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[2] Section 201(b)(1)(A) imposes criminal penalties upon:

> Whoever . . . directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent . . . to influence any official act.

Because *Brewster* involved the acceptance rather than the giving of gratuities and bribes, the court in fact focused on 18 U.S.C. § 201(c)(1) (1969) (covering receipt of bribes, now codified with minor differences in language at § 201(b)(2)(A)), and 18 U.S.C. § 201(g) (1969) (covering receipt of gratuities, now codified with minor differences in language at § 201(c)(1)(B)). The elements of the offense at issue here are the same, however, regardless of whether the defendant is the donor or donee, so *Brewster* stands as a controlling precedent for our case.

> producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, *although the gratuity was produced because of the official act.*

Id. at 72 (emphasis added). As this passage makes tolerably clear, to say that the gratuity provision lacks a *quid pro quo* requirement is not to read the "official act" language out of the statute. It is only to say that, in contrast to bribery, the gratuity and the official act need not each motivate the other. But the gratuity statute by its terms does still require at least a unidirectional relationship--the gift must be "for or because of" the act.

The relation may be simply one of reward. "As the word 'gratuity' implies, the intent most often associated with the offense is the intent to 'reward' an official for an act taken in the past or to be taken in the future." *United States v. Sawyer*, 85 F.3d 713, 730 (1st Cir.1996) (construing virtually identical Massachusetts gratuity statute). Even in such a case, the giver presumably hopes that his gratuity will affect the recipient's future conduct--and this was undoubtedly the concern that motivated Congress to bring rewards for past acts within the coverage of the statute. But, in contrast to bribery, it is enough under the gratuity statute if the defendant gives an unpromised benefit for a past governmental favor. And, whatever degree of intent to influence may be necessary for a bribe, a gift looking to future acts can be an unlawful gratuity where the giver is motivated simply by the desire to increase the likelihood of one or more specific, favorable acts. In summary, as we explained in *Brewster*, "under the gratuity section, 'otherwise than as provided by law . . . for or because of any official act' carries the concept of the official act being done anyway, but the payment only being made *because of a specifically identified act.*" 506 F.2d at 82 (emphasis added).

The independent counsel appears to accept this analysis of *Brewster*, but claims that in that decision we restricted application of the official act requirement to cases involving

elected officials or candidates for elective office. Indeed, Brewster was a senator, and we noted that in cases involving elected officials the official act requirement served the important function of distinguishing illegal gratuities from ordinary campaign contributions. See *id.* at 73 n. 26, 81. But in a footnote we postponed the question of non-elected officials to another day, distinguishing and declining to express ultimate disagreement with *United States v. Umans*, 368 F.2d 725 (2d Cir.1966), a decision that dispensed altogether with the intent requirement in a case involving gratuities offered to I.R.S. agents. *Brewster*, 506 at 73 n. 26.

Even assuming the footnote could be read as suggesting a readiness to jettison the intent requirement in cases involving appointed officials, we disappointed any such expectation eight years later by reaffirming the official act requirement in *United States v. Campbell*, 684 F.2d 141 (D.C.Cir.1982). *Campbell* concerned a Superior Court judge who received free moving services from a trucking firm that he had treated remarkably lightly, issuing nominal or suspended sentences on over 1,000 traffic tickets. We approved a jury charge requiring "that the alleged gratuities be given and received 'knowingly and willingly,' and '*for or because of an official act.*'" *Id.* at 150 (emphasis added). To be sure, the attack in *Campbell* came from the defendants, who claimed a right to an even more restrictive charge. But *Campbell* cannot possibly be said to have stripped the statute of its "for or because of" requirement.

A detail from that case underscores how we have refused to allow the official act requirement to be satisfied by some vague hope of inducing warm feelings toward the donor. Campbell had served as Assistant Corporation Counsel for the District of Columbia before becoming a judge in 1973, and was reputed to have been "sympathetic to trucking interests" during that time. *Id.* at 149 n.13. Yet, responding to a somewhat unclear claim that the jury might have convicted for uncharged prior acts, we noted that "[i]t is not even clear which 'acts' of Robert Campbell could have been the basis for

[the trucking company's] gratuities prior to 1973, because 'sympathy to trucking interests' does not constitute an official act." *Id.* at 149 n.14.[3] Here, too, if Douglas furnished Espy with gifts merely to win his generalized sympathy for Sun-Diamond, those gifts would not be illegal gratuities, unless the jury could find that Douglas sought this generalized sympathy to influence Espy to perform one or more official acts sometime in the future.

At oral argument we questioned the representative of the independent counsel on the application of his theory to instances where an old friend of some newly appointed officeholder took him to a meal or sports event while his firm had matters pending before the officeholder. Counsel appeared to assert that this scenario fell within his view of the statute.[4] Indeed, it would have been squarely within the

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[3] The independent counsel claims that these passages in *Campbell* turn on the notion that an Assistant Corporation Counsel is not in a position to perform official acts. The notion is false--under District law an Assistant Corporation Counsel may, for example, choose to prosecute (or not prosecute) traffic violations, D.C.Code §§ 23-101, 40-622. Perhaps because of its falsity, the notion is never mentioned by the *Campbell* court. Had the government charged Campbell with a pre-1973 decision not to prosecute the trucking company, rather than alleging mere "sympathy," such a decision might well have constituted an official act sufficient to support a gratuity charge.

[4] The colloquy at oral argument was as follows:

> THE COURT: So if an old friend of mine from law school who's a partner in a firm that has a pending case before this Court takes me to a baseball game, as we've done for years, that's an illegal gratuity?
>
> COUNSEL: It may well be, yes.
>
> THE COURT: You're serious?
>
> COUNSEL: If you have a case, if [counsel for Sun-Diamond] takes you to the game tomorrow, takes you to the Redskins game on Sunday while you have this case pending before you, that's a gratuity.

Oral Arg. Tr. at 30-31. The independent counsel's theory here seems truly sweeping: if this hypothetical baseball arrangement has been in place "for years," stretching back to before the judge's investiture, it is difficult to see how it could be motivated by the judge's position. Even if the baseball invitation represented an increment in the donor's hospitality to his friend since the latter's appointment, under this circuit's reading of the statute it would violate § 201(c)(1)(A) only if offered, as the statute says, "for or because of any official act."

district court's charge to the jury. But we trust that, should Congress someday decide to criminalize such conduct, it will *not* require that the gifts be given "for or because of any official act."

The independent counsel points to *United States v. Secord*, 726 F.Supp. 845, 847 (D.D.C.1989), as well as several decisions by other courts of appeals apparently holding that gifts motivated solely by the recipient's official position may be illegal gratuities. See *United States v. Evans*, 572 F.2d 455, 480 (5th Cir.1978); *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir.1979) (en banc);[5] *Umans*, 368 F.2d at 730; *United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir.1995); cf. *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir.1976) (suggesting that donee's ability to use his position for donor's benefit was enough to satisfy the official act requirement). These decisions appear to leap from the

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[5] The independent counsel's briefs made no mention of *Standefer*, but in a petition for rehearing he notes that the Supreme Court, in affirming the judgment on others grounds, *Standefer v. United States*, 447 U.S. 10 (1980), said in a footnote that "the instructions to the jury on criminal intent" were "correct." *Id.* at 14 n. 8. Standefer's briefs in the Supreme Court and the Third Circuit's unpublished panel opinion, *United States v. Standefer*, 1979 WL 4863 (3d Cir.1979), however, make clear that the defendant's challenge was to the absence of a *quid pro quo* requirement, and to the trial court's refusal to instruct the jury that the defendant's gifts to an I.R.S. agent had not in fact resulted in the favorable audit sought by the donor. *Id.* at *4-8. In any event, the instructions in *Standefer*, reprinted in relevant part in the Third Circuit's panel opinion, *id.* at *5, *6, were far narrower than the charge in this case, repeatedly emphasizing the requirement that the gifts be given for or because of tax audits performed by the donee.

gratuity statute's lack of a reciprocal *quid pro quo* requirement to an assumption that it has dispensed with any need to show intent focused on an official act or acts. Thus, the court in *Bustamante* says, "Generally, no proof of a *quid pro quo* is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office." 45 F.3d at 940. Any such leap disregards the explicit language of the statute and contradicts *Brewster* and *Campbell*. Other out-of-circuit cases seem to take the official act requirement more seriously. See, e.g., *United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir.1991) ("an illegal gratuity is a payment made for an act by the recipient that might have been done without any payment") (citing *Brewster*); cf. *Sawyer*, 85 F.3d at 735-36 (construing virtually identical Massachusetts gratuity statute).

Finally, the independent counsel asserts that in *United States v. Baird*, 29 F.3d 647 (D.C.Cir.1994), we embraced his broad interpretation of the gratuity statute. The question in *Baird* was whether the conflict of interest statute, 18 U.S.C. § 203(a), requires the government to prove that a defendant knew the statute covered him. We held that the clause "otherwise than as provided by law," which appears both in § 203(a) and in § 201(c) (then codified at §§ 201(f) and (g)), did not embody such a *scienter* requirement; rather, it merely required a showing that the public official received money to which he was not lawfully entitled. *Id.* at 652. Although the *Baird* opinion cited approvingly to both *Evans* and *Standefer*, see *id.*, it did not address directly the "for or because of any official act" language--doubtless because the conflict of interest statute at issue contained no such language.

Given that the "for or because of any official act" language in § 201(c)(1)(A) means what it says, the jury instructions invited the jury to convict on materially less evidence than the statute demands--evidence of gifts driven simply by Espy's official position. The difference may not seem very great, for whenever a donor has matters actually or potentially pending before his donee, gifts motivated by the latter's position will usually also be motivated by a desire to

reward or elicit favorable official action. But the terms of the statute require a finding that the gifts were motivated by more than merely the giver's desire to ingratiate himself with the official generally, or to celebrate the latter's status.

In his effort to salvage the instructions, the independent counsel points to other portions of the charge in which the judge simply repeated the terms of the statute or the indictment verbatim, e.g., by reciting the words "for or because of an official act." These recitations could not possibly, however, have overcome the broader message. Thus the charge failed to give the jury an adequate understanding of the issues, see *United States v. DeFries*, 129 F.3d 1293, 1304 (D.C.Cir.1997), and the error cannot be called technical or harmless, see *United States v. Lemire*, 720 F.2d 1327, 1339 (D.C.Cir.1983). We reverse and remand for a new trial on Count I.[6]

At the same time, we reject Sun-Diamond's broad attack on the indictment. Again *Campbell* controls. Campbell argued, much as Sun-Diamond does here, that the jury should have been required "to find that the gratuity was conferred with 'specific knowledge' of 'a definite official action for which compensation was intended.'" 684 F.2d at 149. We rejected that argument, holding that it was sufficient for the jury to find that the trucking company had provided free services to Campbell because it believed the judge had been, or would later be, "generally lenient" in dealing with the company's voluminous traffic citations. *Id.* at 149-50. The government, we held, was not required to show that any particular free service provided to Campbell was earmarked for any particular ticket or tickets; leniency in a multitude of specific acts was enough. That an official has an abundance of relevant matters on his plate should not insulate him or his

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[6] We reject Sun-Diamond's contention that the gratuity statute is unconstitutionally vague as applied to its conduct. *United States v. Campbell*, 684 F.2d 141, 150 n. 17 (D.C.Cir.1982); cf. *United States v. Brewster*, 506 F.2d 62, 76-78 (D.C.Cir.1974).

benefactors from the gratuity statute--as long as the jury is required to find the requisite intent to reward past favorable acts or to make future ones more likely.

The Fraudulent Scheme

Sun-Diamond was found guilty on Counts III and IV of committing wire fraud in violation of 18 U.S.C. §§ 1343 & 1346, and on Counts V through IX of violating the Federal Election Campaign Act, 2 U.S.C. §§ 441b(a) & 441f ("FECA"). Both sets of convictions flow from a scheme of Richard Douglas and James H. Lake to help repay the debts of the failed congressional campaign of Mike Espy's brother Henry. The following facts about the scheme come from the testimony of Lake, who was granted immunity by prosecutors in exchange for his cooperation.

Lake was one of the founding partners of a Washington based firm, Robinson Lake Sawyer & Miller ("RLSM"), which handled communications and public relations matters for Sun-Diamond.[7] Sun-Diamond retained RLSM for a fee of $20,000 a month; Douglas oversaw Sun-Diamond's dealings with RLSM and maintained his own office there. RLSM was a wholly-owned subsidiary of Bozell Worldwide, Inc. ("Bozell").

After Mike Espy became Secretary of Agriculture, Henry Espy unsuccessfully pursued election to his brother's vacant seat in Congress, building up a sizable campaign debt in the process. In February 1994 Douglas left a telephone message at Lake's office--a crucial act for jurisdiction over one of the wire fraud counts. When Lake contacted Douglas, he learned that Secretary Espy had asked Douglas for help in retiring his brother's campaign debt. Lake immediately offered to donate

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[7] At certain points in the record this firm is referred to by somewhat different names, such as "RLLM/SMG" (Robinson, Lake, Lerer, Montgomery/Sawyer, Miller Group). For simplicity we will refer to Lake's partnership as RLSM throughout.

$1,000, the maximum permissible individual contribution. Douglas replied that he had to raise at least $5,000 fast, and that he needed Lake's help. He then proposed a way around the campaign finance restrictions. If Lake would get five RLSM employees (including Lake himself) to write a check for $1,000 each, Douglas would find a way for Sun-Diamond to reimburse them all. Lake knew the scheme was illegal--corporations are forbidden to make contributions "in connection with any election" for Congress, 2 U.S.C. § 441b(a), and no one may make a campaign contribution in the name of another person, 2 U.S.C. § 441f--but agreed to participate anyway. Lake testified that no one else at RLSM or Bozell knew about the plan.

Lake wrote a $1,000 check in his own name and then approached the four RLSM employees identified by Douglas. Three of them agreed to pay up. (A fourth-- presumably suspicious about the notion of a reimbursable campaign contribution--declined.) Lake then passed the checks worth $4,000 to Douglas, who deposited them in a "Henry Espy for Congress" account he had opened.

As the vehicle for reimbursement, Douglas settled on the Joint Center Dinner, an annual benefit for which RLSM and Lake had in the past routinely bought tickets on Sun-Diamond's behalf. Lake's staff prepared an internal RLSM document authorizing reimbursement to Lake for his supposed purchase of tickets to the dinner in the amount of $5,000 (even though he had raised only $4,000 for Henry Espy). The same document became part of the monthly invoice sent to Sun-Diamond, billing the client $5,000 for the fictitious dinner attendance on top of its $20,000 monthly retainer and other expenses. Lake received a $5,000 reimbursement check from Bozell, which he cashed and used to pay back the three other individual contributors (apparently pocketing the extra $1,000 for himself). Douglas, as part of his normal duties at Sun-Diamond, approved the payment to RLSM, which eventually went through. The net result: a $5,000 expenditure by Sun-Diamond, $4,000 of which went into Henry Espy's campaign coffers and $1,000 into James H.

Lake's pocket.[8] The independent counsel charged that the scheme worked a fraud on Bozell and RLSM, depriving the former (albeit temporarily) of $5,000, and depriving the latter of the "honest services" of its agent Lake under 18 U.S.C. § 1346. The jury convicted, evidently convinced that at least one such deprivation occurred. The jury also found Sun-Diamond guilty of making illegal campaign contributions in violation of FECA, 2 U.S.C. §§ 441b(a) & 441f.

As a threshold matter, Sun-Diamond raises a challenge which it says goes equally to the wire fraud and FECA counts. Richard Douglas's campaign contribution scheme cannot be attributed to it, Sun-Diamond argues, because Douglas was not acting with an intent to benefit the corporation. It is true, as the district court instructed the jury in this case, that an agent's acts will not be imputed to the principal in a criminal case unless the agent acts with the intent to benefit the principal.[9] Here, Sun-Diamond says, Douglas's scheme was designed to--and did in fact--*defraud* his employer, not benefit it. In this circumstance, it strenuously argues, there can be no imputation: "[T]o establish precedent holding a principal *criminally* liable for the acts of an agent who defrauds and deceives the principal while pursuing matters within his self-interest merely because the agent's conduct *may* provide some incidental benefit to the principal serves to punish innocent principals with no countervailing policy justifications." Appellant's Reply Br. at 16 n.9.

This argument has considerable intuitive appeal--Sun-Diamond does look more like a victim than a perpetrator, at least on the fraud charges. The facts in the record, however--

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[8] In October 1995 RLSM terminated its relationship with Sun-Diamond and returned the $5,000 payment.

[9] In a civil case, there may be no need to show that the agent acted to further the principal's interests--a showing of "apparent authority" is often enough. See *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 573-74, 102 S.Ct. 1935, 1946-47, 72 L.Ed.2d 330 (1982) (private antitrust action).

that Douglas hid the illegal contribution scheme from others at the company and used company funds to accomplish it--do not preclude a valid finding that he undertook the scheme to benefit Sun-Diamond. Part of Douglas's job was to cultivate his, and Sun-Diamond's, relationship with Secretary Espy. By responding to the Secretary's request to help his brother, Douglas may have been acting out of pure friendship, but the jury was entitled to conclude that he was acting instead, or also, with an intent (however befuddled) to further the interests of his employer. The scheme came at some cost to Sun-Diamond but it also promised some benefit. See, e.g., *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 406-07 (4th Cir.1985) (agent's conduct which is actually or potentially detrimental to corporation may nonetheless be imputed to corporation in criminal case if motivated at least in part by intent to benefit it); cf. *Local 1814, International Longshoremen's Association, AFL-CIO v. NLRB*, 735 F.2d 1384, 1395 (D.C.Cir.1984) ("[T]he acts of an agent motivated partly by self-interest--even where self-interest is the predominant motive--lie within the scope of employment so long as the agent is actuated by the principal's business purposes 'to any appreciable extent.'") (quoting *Restatement (Second) of Agency* § 236 & comment b (1957)). Where there is adequate evidence for imputation (as here), the only thing that keeps deceived corporations from being indicted for the acts of their employee-deceivers is not some fixed rule of law or logic but simply the sound exercise of prosecutorial discretion.

And the answer to Sun-Diamond's claim of the absence of any "countervailing policy justification" is simply the justification usually offered in support of holding corporate principals liable for the illegal acts of their agents: to increase incentives for corporations to monitor and prevent illegal employee conduct. See Kevin B. Huff, Note, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 Colum. L.Rev. 1252, 1263 & n.49 (1996). One might well question this justification--and scholars have. See, e.g., Daniel R. Fischel

and Alan O. Sykes, *Corporate Crime*, 25 J. Legal Stud. 319 (1996) (arguing that corporate criminal liability spurs excessive monitoring and litigation costs and should be discarded in favor of civil liability); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. Legal Stud. 833 (1994) (arguing that strict corporate liability may *deter* corporate monitoring by making criminal exposure more likely, so that its imposition may increase the likelihood of crime). Moreover, the justification may be at its weakest in cases like this one, where the offending employee breaches a duty of honesty to the very corporation whose goals he aims to advance. In any event, Sun-Diamond's argument here, whatever its merit as an issue of policy, has no real grounding in the relevant statutes. And Sun-Diamond does not invoke the Constitution, which in any event would require either an overruling of the Supreme Court's rejection of a due process attack on corporate liability, *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613 (1909), or the development of some new theory.

Sun-Diamond also raises a narrower objection concerning imputation, one which goes only to the fraud counts. To the extent Douglas's conduct is to be imputed to his employer, argues Sun-Diamond, then so must Lake's be imputed to his employers (RLSM and Bozell). Both men occupied high-level management positions in their respective firms, and both men's firms sought to establish and maintain good relations with Secretary Espy. If Douglas's knowledge can be imputed to Sun-Diamond to hold it responsible for Douglas's acts, then Lake's must be imputed to his employers, RLSM and Bozell, and they cannot be victims.

Even assuming the evidence showed the balance of private and corporate purpose in Douglas's and Lake's motivation to be identical, Sun-Diamond's argument rests on a faulty assumption--that the imputation rules must be the same on both the perpetrator and victim sides. They need not be, and indeed are not. Imputation is a legal fiction designed

to assist in the allocation of liability, not a literal description of the state of a principal's knowledge. The law imputes the wrongdoer's conduct to the corporation in order to encourage monitoring, but it is not at all clear that imputation on the other side of the equation would be useful in eliciting additional caution on the part of would-be fraud victims. A rule that makes victim wariness a condition of criminally punishing the perpetrator--unlike, say, a rule of contributory negligence in tort--might not inspire much extra precaution in potential victims. However much they may benefit from the criminalization of fraud generally, potential victims (who have many incentives to avoid being gulled, independent of the criminal law) seem unlikely to step up their precautions just to increase the ex ante chances that their deceivers will face criminal sanctions--or so Congress could reasonably conclude. Thus, when an individual is swindled, the offender does not escape mail or wire fraud liability just because the victim was unwary, or even "gullible." See *United States v. Brien*, 617 F.2d 299, 311 (1st Cir.1980). Indeed, Congress's adoption of 18 U.S.C. § 1346, specifying that the term "scheme or artifice to defraud," as used in various federal criminal fraud statutes, should include schemes to deprive a principal "of the intangible right of honest services," is hard to square with an imputation rule on the victim side as broad as the one governing corporate criminal responsibility.

We pause briefly over a final threshold issue before addressing the core of Sun-Diamond's challenge to the fraud convictions. The wire fraud statute forbids the use of the interstate telephone system "for the purpose of executing" a scheme or artifice to defraud. 18 U.S.C. § 1343. Sun-Diamond says the telephone message left by Douglas for Lake preceded their joint concoction of the campaign contribution scheme and thus could not, as a matter of law, have furthered the scheme.[10] There was, however, ample

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[10] This challenge goes only to Count III. The wire communication underlying Count IV was the electronic transmission of the $5,000 billable expense report from RLSM to Bozell.

evidence from which the jury could find that Douglas already had some sort of fraudulent plan in mind when he placed the initial call and left the message. In other words, the jury could have found that Douglas used the telephone system "prior to, and as one step toward, the receipt of the fruits of the fraud," *Kann v. United States*, 323 U.S. 88, 94, 65 S.Ct. 148, 151, 89 L.Ed. 88 (1944), placing the case within the coverage of § 1343.

Sun-Diamond's core challenge to the wire fraud counts raises more serious concerns. The district court charged the jury on two alternative routes to fraud liability. It could convict, said the court, if it found "that Sun-Diamond Growers of California devised a scheme or artifice to defraud with one or both [of] the two following objectives. One, to obtain even temporarily $5,000 from Bozell, Inc. by means of false pretense and representations in order to make an illegal corporate campaign contribution to Henry Espy for Congress Committee. Two, to deprive Bozell, Inc. and [RLSM] of the honest, conscientious, faithful, loyal, disinterested and unbiased services of its employee, James Lake." Because the jury charge was phrased in the disjunctive we must examine the legal sufficiency of each basis for liability, to ensure that the jury did not convict on a legally impermissible ground. See *Griffin v. United States*, 502 U.S. 46, 59, 112 S.Ct. 466, 474, 116 L.Ed.2d 371 (1991) (general verdict based on alternative grounds of liability will be upheld as long as both grounds are legally adequate, even if one is factually inadequate).

As for the first possible objective, we admit that it is not immediately obvious how the contribution scheme could have been designed to deprive Bozell even temporarily of its money or property. Sun-Diamond, through Douglas, caused Bozell to make a routine advance of $5,000 with every expectation that Sun-Diamond would provide prompt reimbursement, and in fact it reimbursed the expense promptly and in full. As the district court correctly noted in the sentencing phase, Bozell was deprived only of the time value of the sum advanced, a deprivation it surely considered

negligible judging from the routine and informal nature of the transaction.

In a case involving fraudulently obtained consumer credit, however, we held that where a defendant makes "material misrepresentations designed to induce an extension of credit that would not otherwise be made, the jury [may] reasonably infer intent to defraud," even if the borrower intended in good faith to repay the loan. *United States v. Alston*, 609 F.2d 531, 538 (D.C.Cir.1979). Moreover, other courts have held that actual repayment is no defense to a charge of fraudulently obtaining a loan, presumably because a loan obtained by fraud subjects the lender to a greater risk of loss than it would have voluntarily borne were it fully informed. *United States v. Scott*, 701 F.2d 1340, 1346-48 (11th Cir.1983); *United States v. Sindona*, 636 F.2d 792, 800 (2d Cir.1980); see also *United States v. Hollis*, 971 F.2d 1441, 1452-53 (10th Cir.1992) (repayment not a defense to bank fraud under 18 U.S.C. § 1344); *United States v. Allen*, 76 F.3d 1348, 1358-59 (5th Cir.1996) (bank was defrauded, at least temporarily, when cashier's checks were fraudulently drawn on bank's account, even though bank was reimbursed in full by holding company at end of month). Notably, to the extent repayment in those cases included interest they did not even feature the time-value deprivation that is present here. Moreover, although the misrepresentation here did not go to the likelihood of the advance being repaid, it was nonetheless material: had Bozell known that the $5,000 was being used to launder an illegal campaign contribution rather than to reserve a table at a charitable dinner, it would not have authorized the advance. Just as deceitful assurances of legality in a conventional loan expose the lender to costly legal entanglements (quite apart from risks of non-repayment), so too did the concealment here.[11]

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[11] Sun-Diamond also offers another reason why Douglas could not have intended to defraud Bozell. According to Sun-Diamond, Douglas anticipated that Sun-Diamond would reimburse Lake directly, or at least

The second alternative ground of liability was that Sun-Diamond defrauded RLSM of the honest services of its agent, James H. Lake, in violation of 18 U.S.C. § 1346. Congress enacted that provision in response to the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), which held that the mail fraud statute's coverage was limited to deprivations of property.[12] Section 1346 says simply that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. The "honest services" theory has typically been used, both in cases up to *McNally* and again under § 1346, as a tool for prosecuting corrupt public officials who have deprived citizens of their right to honest representation. See *United States v. Paradies*, 98 F.3d 1266, 1283 n. 30 (11th Cir.1996) (collecting cases). But it has also been used, as here, to prosecute private citizens who defraud private entities. See, e.g., *United States v. Lemire*, 720 F.2d 1327 (D.C.Cir.1983); *United States v. DeFries*, 129 F.3d 1293, 1305-06 (D.C.Cir.1997); *United States v. Jain*, 93 F.3d 436 (8th Cir.1996); *United States v. Frost*, 125 F.3d 346 (6th Cir.1997); *United States v. D'Amato*, 39 F.3d 1249 (2d Cir.1994); *United States v. Cochran*, 109 F.3d 660 (10th Cir.1997); *United States v. Gray*, 96 F.3d 769 (5th Cir.1996).

In the private sector context, § 1346 poses special risks. Every material act of dishonesty by an employee deprives the

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that Lake's employer would await payment from Sun-Diamond before reimbursing Lake, thus avoiding even a temporary deprivation. (In fact Sun-Diamond contends, implausibly, that there was no evidence from which a jury could infer that Douglas even knew of Bozell's existence.) Given Douglas's experience with Sun-Diamond/RLSM billing practices, however, he could reasonably have foreseen the possibility that Lake would seek an advance from his employer or its parent company at the time he hatched the scheme.

[12] The elements required for conviction under § 1341 (mail fraud) and § 1343 (wire fraud) are identical except for the means of communication. *United States v. Lemire*, 720 F.2d 1327, 1334-35 n. 6 (D.C.Cir.1983).

employer of that worker's "honest services," yet not every such act is converted into a federal crime by the mere use of the mails or interstate phone system. Aware of the risk that federal criminal liability could metastasize, we held in *Lemire* that "not every breach of a fiduciary duty works a criminal fraud." *Lemire*, 720 F.2d at 1335, quoting *United States v. George*, 477 F.2d 508, 512 (7th Cir.1973). Rather, "[t]here must be a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer." *Id.* at 1337.[13] Absent reasonably foreseeable economic harm, "[p]roof that the employer simply suffered only the loss of the loyalty and fidelity of the [employee] is insufficient to convict." *Frost*, 125 F.3d at 368.

The independent counsel says that Douglas and Lake's fraudulent scheme threatened serious economic harm to RLSM, because disclosure of a name partner's fraudulent use of RLSM's offices to funnel illegal contributions to a political candidate would severely damage the firm's reputation. The district court agreed, 964 F.Supp. at 493-94. As Lake testified, the chief assets of a public relations firm are its legitimacy and credibility in the eyes of current and potential clients. Both stood to be undermined by Douglas and Lake's actions. There is no doubt that Douglas and Lake could have foreseen that their actions would cause substantial economic harm to RLSM once word of the scheme got out.

Sun-Diamond, however, says this is not enough. It contends that in the private sector context § 1346 and *Lemire* demand a showing that the defendant *intended* to cause economic harm to his victim, not merely that he could have

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[13] *Lemire* was a pre-§ 1346 decision, but Congress's evident intent in enacting that provision was to revive pre-*McNally* caselaw, at least with respect to the deprivation of honest services. See, e.g., *Frost*, 125 F.3d at 364 ("We therefore hold that § 1346 has restored the mail fraud statute to its pre-*McNally* scope, according to previous opinions interpreting the intangible right to honest services.").

reasonably foreseen such harm. Since the economic harm identified by the independent counsel flows exclusively from disclosure of the contribution scheme, and since Douglas surely did not intend for his scheme to be revealed (except possibly to Mike Espy, so that the Secretary's gratitude could be properly directed), Sun-Diamond reasons that it is free from liability under § 1346. In response to this argument, it will not do to cite "the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 278, 99 S.Ct. 2282, 2295, 60 L.Ed.2d 870 (1979). Applying the presumption to the actual detection and revelation of an illegal scheme would threaten to turn the word "intent" inside out. Is a criminal who foresees his own capture thereby said to intend it? If so, are especially elusive criminals, whose apprehension is *ex ante* relatively unlikely, in a better legal position than clumsy ones?

We need not address these questions, because we disagree with Sun-Diamond's contention that § 1346 and *Lemire* require the government to show that the defendant intended to cause economic harm to his victim. Sun-Diamond appears to confuse the requirement of an intent to defraud (amply met here, since the crux of the scheme was the submission of a fictitious expense report to RLSM) with a requirement of intent to cause economic harm. But *Lemire* did not go so far as to say that economic harm must be part of the defendant's intent in a private-sector "honest services" case--only that economic harm be within the defendant's reasonable contemplation. Although *Lemire* dealt with failure to disclose a conflict of interest rather than with an active scheme to defraud, its treatment of the foreseeability issue governs this case:

> So long as the jury finds the non-disclosure furthers a scheme to abuse the trust of an employer in a manner that makes an identifiable harm to him, apart from the breach itself, *reasonably foreseeable*, it may convict the employee of wire fraud. The crucial determination must be whether the jury could infer that the defendant *might reasonably have contemplated* some concrete business harm to his employer . . .

Lemire, 720 F.2d at 1337 (emphasis added); see also *United States v. Von Barta*, 635 F.2d 999, 1005-06 n. 14 (2d Cir.1980) (relied on in *Lemire*). As we reaffirmed recently, "*Lemire* held that breaches of fiduciary duty are criminally fraudulent only when 'accompanied by a misrepresentation or nondisclosure that is intended *or is contemplated* to deprive the person to whom the duty is owed of some legally significant benefit.' " *DeFries*, 129 F.3d at 1306, quoting *Lemire*, 720 F.2d at 1335 (emphasis added). See also *Frost*, 125 F.3d at 368 (holding that, in cases where employee is charged with defrauding private employer of his own honest services, "[t]he prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee *foresaw or reasonably should have foreseen* that his employer might suffer an economic harm as a result of the breach.") (emphasis added); *D'Amato*, 39 F.3d at 1257 (pre-§ 1346 case holding that misrepresentations amounting only to a deceit "must be coupled with a contemplated harm to the victim").

We therefore affirm the convictions for wire fraud on Counts III and IV.[14]

Sentencing Issues

Sun-Diamond challenges two aspects of its sentence: the district court's upward departure based on Espy's position as Secretary of Agriculture, and the imposition of reporting

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[14]Sun-Diamond does not challenge the adequacy of the jury charge on the "honest services" theory of liability under §§ 1343 & 1346.

requirements on the member cooperatives. We agree with Sun-Diamond and reverse on both points.

District courts may make upward departures from the Sentencing Guidelines only if "there exists an aggravating . . . circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b); U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 5K2.0. We review district court determinations that a given factor is present in a particular case to a degree not adequately considered by the Commission only for abuse of discretion, because "[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." *Koon v. United States*, 518 U.S. 81, 98, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996). But whether a given factor could *ever* be a permissible basis for departure is a question of law which we address *de novo*. *Id.* Here, the issue is in a sense one of degree--how much authority and status might elevate a position above even the rank for which the Guidelines prescribe an eight-level hike--but it also poses the onetime issue of whether cabinet-level officers enjoy such lofty status, hardly the sort of fact-intensive issue calling for extreme deference.

The guideline applicable to violations of the gratuity statute prescribes a base offense level of 7. U.S.S.G. § 2C1.2. It calls for a two-level increase if the offense involved more than one gratuity, and an eight-level increase

> [i]f the gratuity was given, or to be given, to an elected official or any official holding a high-level decision making or sensitive position.

Id. The district court imposed both the two-level and the eight-level increase, bringing the offense level to 17. It then appended an additional two-level increase, finding that the Guidelines did not adequately take into account Espy's position as a cabinet-level official. This increase in offense

level from 17 to 19 doubled Sun-Diamond's base fine from $250,000 to $500,000. U.S.S.G. § 8C2.4. The court then assigned Sun-Diamond a "culpability score" of 9 out of a possible 10, see *id.* § 8C2.5, a determination Sun-Diamond does not challenge here. This culpability score dictated a minimum multiplier of 1.8 and a maximum of 3.6, id. § 8C2.6, leading to an applicable fine range of $900,000 to $1,800,000, from which the court chose a figure in the "upper range"--$1,500,000.

In support of departing upward on account of the high level of the donee's position, the district court reasoned:

> The President has but one cabinet with select members who the court deems to be on a higher level with regard to the type of responsibility which is otherwise contemplated by the guidelines, and the Secretary of Agriculture, in fact, is tenth in the order of succession to the Office of the Presidency. That is not an insignificant fact, and as unlikely as it may be that the Secretary of Agriculture would assume the Presidency of the United States because circumstances would not normally present that opportunity, nevertheless, there is a reason for creating a pecking order to the position which many believe is the position of the most powerful person on the face of the earth.
>
> In any event, the court [notes] for example that Secretary Espy administered a budget of $65 and one half billion, this figure represents 4.3 percent of the totai federal budget. He's responsible for a great work force and makes decisions frequently that have a significant and broad and wide-ranging effect on the American population, and some might believe on the population of . . . other parts of the world.

As the Secretary of Agriculture obviously holds a "high-level decision-making or sensitive position," it is clear that the district court rested its departure not on a finding that cabinet-level status was the *kind* of factor the Sentencing Commission failed to consider in formulating § 2C1.2, but on a belief that his position is so high-level that it represents an aggravating circumstance present to a *degree* not taken into account by the Commission.

This conclusion is at odds with the Sentencing Commission's explanation of § 2C1.2.[15] The Application Notes explain that "'Official holding a high-level decision-making or sensitive position' includes, for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility." U.S.S.G. § 2C1.2, App. Note 1. We do not think the Secretary of Agriculture holds a position that in level or sensitivity differs in any material degree from persons the Application Note explicitly says were within the Commission's contemplation.

Since the Secretary administers an agency, a straightforward reading of the Application Note strongly suggests that he falls within the "agency administrator" category. The independent counsel says that this term was meant to refer to lower-level program administrators, of which it says there are 85 or so within USDA alone, Appellee's Br. at 43 n.15, but never explains why we should assume the Sentencing Commission had such a limited category in mind. The Application Note expressly lists judges as the sort of high-level officials for which the eight-level departure is appropriate. Perhaps our perspective is skewed, but offering a gratuity to a life-tenured federal judge seems to us at least as culpable as offering one to a cabinet secretary--

[15] "In determining whether a circumstance was adequately taken into consideration the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. § 3553(b).

indeed, we suspect most citizens would consider the former a more troubling breach of public trust than the latter. To permit a two-level departure for the latter, when such a departure is specifically precluded for the former, appears illogical.

Nor is the district court's decision rescued by its observations about presidential succession. The Guideline includes elected officials without apparent regard to the loftiness or sensitivity of their positions, and the Application Note says nothing to suggest variation within the elected-official category. Thus it appears to sweep in officials ranging in rank from Representative to President. Even assuming that a case involving the President might present a *sui generis* situation warranting departure, Sun-Diamond points out that the Speaker of the House is second in line to the presidency after the Vice President, 3 U.S.C. § 19, and yet is also presumably taken into account by § 2C1.2 as an "elected official." The independent counsel responds that "perhaps the Sentencing Commission did not take into consideration the position and power of the Speaker of the House when it drafted the bribery and gratuity guidelines." Appellee's Br. at 45 n.16. Conceivably, but more likely the Commission meant, as it said, to lump all federal elected officials together, in contrast with other officials whose rank was seen to vary enough to require consideration of levels of responsibility. Similarly, the Attorney General--seventh in line to the presidency--seems to fit within the Application Note's "supervisory law enforcement officers" category. Though we need not, and do not, decide today the status of these officials with respect to § 2C1.2, their seeming inclusion argues strongly against the idea that the Sentencing Commission failed to take adequately into account the degree of responsibility of an official further down the line of presidential succession.

Moreover, the district court's approach makes one wonder how far one must go down the line of succession before one finally reaches the heartland of § 2C1.2. The

Secretary of Agriculture is in fact ninth in the line of succession, 3 U.S.C. § 19, not tenth as the district court stated.[16] This makes his connection to ultimate power just as attenuated as that of the anti-hero of "Kind Hearts and Coronets," who had to murder eight Alec Guinnesses to become Duke of Chalfont. What of the Secretary of Health and Human Services, at number twelve in the queue, *id.*, or the Secretary of Veterans Affairs, at seventeen, *id.*? Of course, questions of line-drawing are often difficult, and in the sentencing arena such questions are normally best resolved by the district courts on a case-by-case basis. Here, however, the factor invoked in support of departure--cabinet-level status--is not one that the district courts enjoy any comparative advantage in assessing, unlike such fine-grained, fact-bound circumstances as extreme psychological injury, see U.S.S.G. § 5K2.3, or victim misconduct, see *id.* § 5K2.10. We conclude that the two-level upward departure was impermissible.

Sun-Diamond also challenges the imposition of reporting requirements on its member cooperatives. The district court declared, as a condition of probation, that "Sun-Diamond and its members [sic] cooperatives shall provide quarterly submissions to the probation officer reporting all of the organization's expenditures related to all federal employees, office holders or candidates for federal office [including] any expenditure related [to] the procurement of any federal government contract, creation of a federal law or regulation, or the development of any federal policy." These requirements were to continue in force for five years.

We recognize that the sentencing judge has broad discretion to establish conditions of probation. *Lemire*, 720 F.2d at 1352. But we know of no precedent for the imposition of probationary conditions on entities who are not defendants,

[16] The current Secretary of Agriculture, however, is in practical effect eighth in line, since Secretary of State Madeleine Albright, having been born abroad, is ineligible. See U.S. Const. art. II, § 1, cl. 5.

nor even agents of defendants--the latter category problematic in its own right, but much more plausibly legitimate than the present case. Although the independent counsel paints Sun-Diamond as a mere alter ego of the cooperatives that own it, we are not persuaded. The member cooperatives have their own corporate identities, boards of directors, employees, assets and liabilities, as does Sun-Diamond. Their power to control Sun-Diamond seems no greater than the power of ordinary shareholders to control a corporation.

As the Ninth Circuit has explained, imposition of a condition on a third party exposes the defendant to revocation of probation for "violations" by persons not under his control. *United States v. Sweeney*, 914 F.2d 1260, 1263 (9th Cir.1990). Cf. *Fiore v. United States*, 696 F.2d 205, 208-09 (2d Cir.1982) (reversing condition of probation imposed on defendant who was president, secretary, sole stockholder and only full-time employee of corporate co-defendant, which had required him to pay fine imposed on corporation). And 18 U.S.C. § 3563, which enumerates mandatory and discretionary conditions of probation, specifies in every one of them the "defendant" as the person to be burdened. See *Sweeney*, 914 F.2d at 1263. As the member cooperatives were not made defendants and given an opportunity to be heard, they may not now be subjected to probation.

* * *

We reverse and remand for new trial on Count I; we affirm the convictions on Counts III through IX; and we vacate Sun-Diamond's sentence and remand for further proceedings consistent with this opinion.

So ordered.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3072 **September Term, 1997**
96cr00193-01

United States of America,
Appellee

v.

Sun-Diamond Growers of California,
Appellant

BEFORE: Williams, Henderson, and Tatel, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of appellant and appellee, filed May 4, 1998, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3072 **September Term, 1997**
96cr00193-01

United States of America,
Appellee

v.

Sun-Diamond Growers of California,
Appellant

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellee's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

A statement of Circuit Judge Wald concurring in the denial of rehearing in banc is attached.

Circuit Judges Sentelle and Garland did not participate in this matter.

WALD, *Circuit Judge, concurring in the denial of rehearing* en banc:

I find the interpretation of 18 U.S.C. § 201(c)(1)(A) (1994) so as not to cover any gifts or gratuities made by a regulated company to high officials of the regulating agency troubling. Given the choice, I would have construed the statutory prohibition as the Fifth Circuit has done. *See United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir. 1995); *United States v. Evans*, 572 F.2d 455, 480 (5th Cir. 1978). However, I have concluded that calling for a vote on the *en banc* petition would be futile in this case. The current circuit split calls for Supreme Court attention. The ephemeral distinction between bestowing gifts and gratuities on a high government official who has regulatory jurisdiction over the giver solely because of that official's "position," rather than in the hopes of obtaining a favorable attitude in any future regulatory act, may commend itself to lawyers and judges, but I suspect it would not pass the "snicker test" with laymen. I read the panel decision as requiring only that the gifts be tied to some future acts by the official, even if those acts are neither specified nor even known at the time of the gift; this case does not hold that the prosecutor must establish that particular gratuities were given to influence particular official acts. Nonetheless, I admit that the main distinction the panel draws between gifts motivated by an official's "position" and gifts motivated by an official's "acts" eludes me altogether. I suppose it is conceivable that someone might give gifts to a high official simply to create the impression that he is a "big shot" or "insider," without regard to how the official wields his power. But this hardly seems likely in the case of a regulated entity. Much more likely is the assumption that inherent in an official's "position" is his capacity to perform regulatory acts which will affect the gift-giver.

APPENDIX C

UNITED STATES of America

v.

SUN-DIAMOND GROWERS OF CALIFORNIA, Defendant.

Crim. Action No. 96-193 RMU.

United States District Court, District of Columbia.

Sept. 9, 1996.

Donald C. Smaltz, Theodore S. Greenberg, Kathleen M. Nicolaides, Barry Coburn, Office of Independent Counsel, Alexandria, VA, for Plaintiff.

Richard A. Hibey, Eric W. Bloom, Winston & Strawn, Washington, DC, for Defendant.

MEMORANDUM OPINION AND ORDER

URBINA, District Judge.

Denying Sun-Diamond's Motion to Dismiss the Indictment

I. Background

On September 9, 1994, pursuant to 28 U.S.C. Section 593(b), the United States Court of Appeals for the District of Columbia Circuit, Special Division for the Appointment of Independent Counsels (Special Division), appointed Donald C. Smaltz Independent Counsel to investigate whether former

Secretary of Agriculture Alphonse Michael (Mike) Espy (Secretary Espy) violated federal criminal law by accepting improper gifts from organizations or individuals with business matters pending before the Department of Agriculture while he was Secretary of Agriculture.

Sun-Diamond, a large agricultural cooperative based in California, had business matters pending before the Department of Agriculture during Secretary Espy's tenure. Sun-Diamond is owned by five member cooperatives: Diamond Walnut Growers, Sun-Maid Growers of California, Sunsweet Growers, Inc., Valley Fig Growers, and Hazelnut Growers of Oregon. In December 1994, the Office of Independent Counsel (OIC) began its investigation of Sun-Diamond using a grand jury convened by this court. The grand jury returned an indictment against Sun-Diamond alleging that the defendant had unlawfully provided $9,000 worth of gifts, directly or indirectly, to Secretary Espy, in violation of the federal gratuity statute, 18 U.S.C. § 201(c)(1)(A). The indictment further alleges that Sun-Diamond devised and executed a scheme to make an unlawful corporate contribution, in the name of another, in the amount of $4,000 to a federal candidate for office, in violation of 2 U.S.C. § 441b(a) and 441f.

Specifically, count I alleges that Sun-Diamond, through its former Senior Vice President, Richard Douglas (Mr. Douglas), expended on Secretary Espy's behalf, over a 14 month period, approximately $2,295 for tickets to the 1993 U.S. Open Tennis Tournament, approximately $2,427 for luggage, approximately $665 for meals, and approximately $524 for a framed print, packing for the print, and a crystal bowl. Count I also charges that all of the expenses associated with the gratuities given by Mr. Douglas to Secretary Espy were reimbursed by Sun-Diamond as company business expenses. Count II alleges that Mr. Douglas advanced $3,100 to Secretary Espy's girlfriend, Patricia Dempsey, to pay for the cost of an airplane ticket so that she could accompany Secretary Espy to a trade association conference in Greece. The indictment further alleges that the trade association that sponsored the conference reimbursed Mr. Douglas.

Counts III through IX allege the following: Mr. Douglas and James H. Lake (Mr. Lake), a principal of Robinson, Lake, Sawyer and Miller (Robinson-Lake), a public relations firm in Washington, D.C., together devised a scheme to enable Sun-Diamond to make an unlawful corporate contribution in the name of another.[1] To effect this contribution, Mr. Douglas and Mr. Lake allegedly agreed that Mr. Lake would obtain $1,000 contribution checks from several Robinson-Lake employees. Robinson-Lake then invoiced Sun-Diamond for a false and fictitious expense sufficient to cover these contributions. Finally, Sun-Diamond's payment of the expense to Robinson-Lake was used to reimburse the individuals that advanced the campaign contributions.[2]

II. Discussion

This matter comes before the court upon Sun-Diamond's motion to dismiss the indictment in this case. Sun-Diamond raises six arguments in support of its motion. Each argument addresses one or more counts contained in the indictment. First, Sun-Diamond argues that count I, which charges a violation of the gratuity statute, should be dismissed because it fails to allege that Sun-Diamond provided things of value to Secretary Espy to reward him for an act he had already performed or had committed himself to perform. Second, Sun- Diamond posits that count II, which also alleges a violation of the gratuity statute, should be dismissed because it fails to allege that Sun-Diamond provided a "thing of value" to Secretary Espy. Third, Sun-Diamond moves to dismiss counts I and II because the allegations set forth therein do not distinguish between innocent gift giving and illegal gratuities.

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[1] Henry Espy, Secretary Espy's brother, was to be the beneficiary of the contribution. Henry Espy ran, unsuccessfully, for the congressional seat vacated by Secretary Espy when he became Secretary of Agriculture.

[2] Counts III and IV allege wire fraud. Counts V through IX allege violations of the Federal Election Campaign Act.

Fourth, Sun-Diamond requests that the court dismiss counts III through IX of the indictment because the violations alleged in those counts are outside the scope of the independent counsel's jurisdiction. Fifth, Sun-Diamond moves to dismiss count III, which alleges wire fraud, because the alleged wire communication at issue did not further the execution of the alleged scheme.[3] Lastly, Sun-Diamond moves to dismiss, or in the alternative strike, the part of counts III and IV that allege that Mr. Douglas and Mr. Lake sought to defraud two entities, Robinson-Lake and its parent company, Bozell Worldwide, Inc., of the intangible right to Mr. Lake's honest services. The court will address each argument *seriatim*.

A. Gratuity Statute

1. Introduction

Sun-Diamond moves to dismiss count I of the indictment on the basis that the indictment fails to allege that Sun-Diamond provided things of value to Secretary Espy for an improper purpose. More particularly, Sun-Diamond claims that the indictment does not allege that Sun-Diamond provided things of value to reward Secretary Espy for a specific act he had already performed or was already committed to perform. Sun-Diamond contends that the indictment must allege and the OIC must demonstrate a nexus between the alleged gratuity and "a definite official act for which [Sun-Diamond] intend[ed] to compensate[,]" Secretary Espy in order for its conduct to be in violation of 18 U.S.C. § 201(c), the gratuity statute. Given this required nexus, Sun-Diamond argues, the indictment must allege that it "intended to reward [Secretary Espy] for past action or action [the Secretary] was already committed to take." As fully discussed *infra*, to sustain a charge under the gratuity statute, it is not necessary for the indictment to allege a direct nexus

[3] The alleged scheme relates to the effort by Mr. Douglas and Mr. Lake to make an unlawful campaign contribution to help retire Henry Espy's campaign debt.

between the value conferred to Secretary Espy by Sun-Diamond and an official act performed or to be performed by Secretary Espy. It is sufficient for the indictment to allege that Sun-Diamond provided things of value to Secretary Espy because of his position. Accordingly, the court denies Sun-Diamond's motion to dismiss count I.

2. Analysis

The indictment alleges that there were two matters pending before the Department of Agriculture and Secretary Espy, in which Sun-Diamond had a significant economic stake. They were the market promotion program (MPP) and the issue of whether the fumigant methyl bromide would be banned by the Environment Protection Agency (EPA). During 1993 and 1994, the Department of Agriculture administered a grant program, MPP, designed to increase export sales of certain U.S. agricultural commodities abroad. Under the MPP, the Secretary of Agriculture was authorized to award government funds to trade organizations, if the Secretary determined that such organizations would significantly contribute to the sale of U.S. farm commodities abroad. To receive money to market their products abroad, trade organizations submitted marketing plan applications to the Department of Agriculture. By law, the Secretary of Agriculture had to approve the award of MPP money to each trade organization. The trade organizations would in turn award money to companies, like the member cooperatives of Sun-Diamond, to pay for part of their marketing campaigns in foreign countries.

Beginning in or about August 1993, the Department of Agriculture was required by law to develop regulations which gave small-sized entities preference in obtaining certain MPP funds. During that time, the Department of Agriculture entertained the issue of whether to include cooperatives in the definition of a small-sized entity. The indictment alleges that Sun-Diamond wanted the Secretary of Agriculture to direct the Department of Agriculture to promulgate MPP regulations

that would allow Sun-Diamond member cooperatives to receive the preferences provided for small entities. In addition, Sun-Diamond wanted the Department of Agriculture to continue to study the issue with a view towards giving cooperatives the same preference given to small-sized entities.

The other matter pending before the Department of Agriculture in which Sun-Diamond had an economic stake involved methyl bromide. Methyl bromide was a chemical used to kill pests and other insects when planting orchards and fields, as well as after a commodity was harvested. Certain Sun-Diamond member cooperatives used the chemical for post-harvest fumigation of walnuts, prunes, and figs.

In 1992, the EPA announced plans to promulgate a rule which would phase out and ultimately bar the use of the chemical in the U.S. In 1993 and 1994, Sun-Diamond, and more particularly Diamond Walnut Growers, Inc., was concerned that the loss of methyl bromide and a lack of a viable alternative thereto, would hurt their ability to sell their products. Consequently, Sun-Diamond sought the assistance of the Department of Agriculture to persuade the EPA to delay promulgating the rule that would phase out and eliminate the use of methyl bromide. Sun-Diamond also sought to have the Department of Agriculture increase its funding for research for alternatives to methyl bromide in the event that the use of the chemical became restricted or prohibited.

Count I alleges that Sun-Diamond violated Section 201(c)(1)(A) by providing Secretary Espy with improper gratuities. Section 201(c)(1)(A), provides, in pertinent part,

> Whoever . . . gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . . shall be fined

> under this title or imprisoned not more than two years, or both.[4]

Sun-Diamond concedes that Secretary Espy was a public official during the relevant time period of the indictment, namely, January 5, 1993 through March 11, 1994. Additionally, Sun-Diamond acknowledges that count I sufficiently identifies things "of value" that Sun-Diamond allegedly gave to Secretary Espy, e.g., tickets, meals and limousines for the U.S. Open Tennis Tournament, luggage, and meals at restaurants. Sun-Diamond, however, maintains that it did not give these items of value to Secretary Espy "for or because of any official act performed or to be performed by" Secretary Espy.[5] The pertinent official acts relate to the MPP and methyl bromide, the two matters pending before the Department of Agriculture in which Sun-Diamond had a significant economic stake.

The issue before the court is whether, with respect to appointed officials, the gratuity statute requires the indictment to allege a nexus between the provision of things of value and a specific official act performed or committed to be

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[4] Count I also alleges that Sun-Diamond violated 18 U.S.C. § 2, the aiding and abetting statute, which provides,

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2(a) and (b).

[5] An official act is defined by 18 U.S.C. § 201(a)(3) (West Supp.1996) as being,

> any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

performed by the appointed official. This District Court and the various federal courts of appeal that have addressed this precise issue have concluded that the gratuity statute does not require such nexus to be alleged by an indictment. Rather, it is sufficient for the indictment to allege that the provider of the gratuity has matters within the purview of the official receiving the gratuity, and that the gratuity be provided "simply *because* of . . . [the] official['s] position, in appreciation of th[e] relationship, or in anticipation of its continuation." *United States v. Secord*, 726 F.Supp. 845, 847 (D.D.C. 1989) (emphasis in the original). "The Government need not prove that the gratuity was given in exchange for any specific official act; there need be no '*quid pro quo* . . . '" *Id.* "[T]he Government must [only] show that Defendant acted simply because of [the individual's] official position . . ." *Id.*[6]

Sun-Diamond's reliance on *United States v. Brewster*, 506 F.2d 62 (D.C. Cir.1974), is unavailing. In *Brewster*, a former United States Senator was charged with bribery and with accepting illegal gratuities. He was acquitted of the bribery charges. He was, however, convicted of accepting illegal gratuities in the form of campaign contributions that he received from a mail-order company that had an interest in defeating enactment of pending legislation to increase postal rates. *Id.* at 67. The Senator appealed his convictions and the U.S. Court of Appeals for the District of Columbia Circuit reversed on the basis that the jury instructions did not distinguish "with indisputable clarity" between the elements of bribery and gratuity. *Id.*

The *Brewster* court, in distinguishing between the elements constituting the crimes of accepting a bribe and accepting an illegal gratuity, explicitly stated: "The bribery section makes necessary an explicit quid pro quo which *need not exist if only an illegal gratuity is involved*; the briber is the

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[6] *See also United States v. Crutchfield*, 547 F.2d 496 (9th Cir.1977); *United States v. Alessio*, 528 F.2d 1079 (9th Cir.1976), *cert. denied*, 426 U.S. 948, 96 S.Ct. 3167, 49 L.Ed.2d 1184 (1976).

mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity[.]" *Id.* at 72 (emphasis added). This statement weakens Sun-Diamond's argument that this Circuit requires the indictment to allege that a nexus between the gratuity and a specific official act exists. Under the bribery statute, the focus is on the briber who instigates an official act. However, as *Brewster* makes clear, under the gratuity statute, the emphasis is not on the act, which the official might have done with or without the provision of an improper gratuity. Rather, the definition of "official act" denotes that the official need not have undertaken or committed himself to undertake a specific act. An official act is one which involves "any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at the time be *pending*[.]" 18 U.S.C. § 201(a)(3) (emphasis supplied). Presently, the indictment alleges that there were two matters pending before Secretary Espy in which Sun-Diamond had a significant interest. There is no indication that the gratuity statute or the definition of the term "official act" require the indictment to allege that Sun-Diamond intended to *reward* Secretary Espy for an act that he had done or committed himself to do.

In *Brewster*, the court's concern centered on an elected official's potential criminal liability under the gratuity statute. In the context of a politician receiving an illegal gratuity the court stated,

> [n]o politician who knows the identity and business of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. There must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence.

Id. at 81. The difficult question in *Brewster* therefore involved the ability of the jury to distinguish between illegal gratuities and legal campaign contributions. The court found

that the trial judge had not made the distinction intelligible to the jury and, as a consequence, implicitly required a heightened nexus standard between the illegal gratuity and the official act. The court required such a standard because of the Senator's status as an elected, rather than an appointed official. As the court recognized, "[e]very campaign contribution is given to an elected public official probably because the giver supports the acts done or to be done by the elected official." *Id.* at 72 n.26. In the case of elected officials, a nexus was required, otherwise, ". . . there is no distinction in the case of an elected public official between an illegal gratuity and a perfectly legitimate, honest campaign contribution." *Id.*

This concern is, however, inapplicable with respect to appointed officials. As the court subsequently explained, "the requisite [criminal] intent must be more clearly shown when the case involves a campaign contribution to 'an elected public official' than 'when the recipient is an . . . appointed official.'" *United States v. Campbell*, 684 F.2d 141, 150 n.16 (D.C. Cir. 1982) (quoting *Brewster*, 506 F.2d at 73 n.26).[7] Consequently, in cases involving appointed officials, such as the present matter, it is sufficient for the indictment to allege that Secretary Espy received things of value because of his status as Secretary of the Department of Agriculture.[8]

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[7] In *Campbell*, the court upheld the conviction of a Superior Court judge for receiving an illegal gratuity. The court concluded that it was "more than sufficient" for the trial judge to require that the gratuity be given and received "knowingly and willingly," and "for or because of an official act." *Id.* at 150. The court did not require the government to establish a nexus between the gratuity and a specific official act.

[8] Because the court finds the statute to be unambiguous, it declines Sun-Diamond's invitation to apply the rule of lenity. The rule of lenity stands for the principle that if a criminal statute is subject to multiple meanings, the court should resolve any ambiguity in favor of the defendant. *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955). That rule, however, is applicable only in situations where the language of the statute is not clear. *See United States v.*

Courts of appeal from other jurisdictions have similarly given Section 201(c) a broad interpretation. The Sixth Circuit has held that the "purpose of the [gratuity statute] is to reach all situations in which a government agent's judgment concerning his official duties may be clouded by the receipt of an item of value given to him by reason of his position." *United States v. Gorman*, 807 F.2d 1299, 1304 (6th Cir.1986), *cert. denied*, 484 U.S. 815, 108 S.Ct. 68, 98 L.Ed.2d 32 (1987). In *United States v. Evans*, 572 F.2d 455 (5th Cir.), *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978), the Fifth Circuit stated:

> [U]nder the unlawful gratuity subsection all that need be proven is that the official accepted, because of his position, a thing of value 'otherwise than as provided by law for the proper discharge of official duty.'. . . Thus, [the gratuity statute] makes it criminal for a public official to accept a thing of value to which he is not lawfully entitled, regardless of the intent of the donor or donee.

Id. at 480-481 (internal citations omitted). Importantly, our court of appeals has quoted with approval *Evans*, upon which the court in *Secord* relied. "'The gravamen of [the offense of taking an illegal gratuity] is not an intent to be corrupted or influenced, but simply the acceptance of an unauthorized compensation.'" *United States v. Baird*, 29 F.3d 647, 652 (D.C. Cir. 1994) (quoting *Evans*, 572 F.2d at 481). The court also cited with approval *United States v. Standefer*, 610 F.2d 1076, 1079 (3d. Cir.) (en banc), *aff'd on other grounds*, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980), which concluded that all that the jury needs to find under the gratuity statute is that the defendant received a gratuity because of his official position.

Schwartz, 785 F.2d 673, 681 (9th Cir.), *cert. denied*, 479 U.S. 890, 107 S.Ct. 290, 93 L.Ed.2d 264 (1986).

Finally, in *United States v. Bustamante*, 45 F.3d 933 (5th Cir.), *cert. denied*, --- U.S. ----, 116 S.Ct. 473, 133 L.Ed.2d 402 (1995), the court held,

> To find a public official guilty of accepting an illegal gratuity . . . no proof of a quid pro quo is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office . . . In addition, the jury need not find that the official accepted the gratuity with the intent to be influenced. The jury must only conclude that the evidence establishes beyond a reasonable doubt that the official accepted unauthorized compensation.

Id. at 940 (internal citations omitted).[9] Thus, the government need not prove that the gratuity was given in exchange for a specific official act. *Bustamante*, 45 F.3d at 941. Consequently, the indictment need not allege that Secretary Espy took or committed to take any action beneficial to Sun-Diamond with respect to the MPP and/or methyl bromide because, "[e]ven if corruption is not intended by the donor or the donee, there is still a tendency in such a situation to provide conscious or unconscious preferential treatment of the

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[9] *See United States v. Niederberger* 580 F.2d 63 (3d Cir.1978), *cert. denied*, 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed.2d 651 (1978). In *Niederberger*, the court upheld the gratuity conviction of an IRS employee in charge of auditing a large company which provided him with golfing trips. The court made clear that the gratuity statute did not obligate the government to prove a specific intent or to establish a *quid pro quo*. *Id.* at 69. *See also United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir.), *cert. denied*, 426 U.S. 948, 96 S.Ct. 3167, 49 L.Ed.2d 1184 (1976) (the court upheld gratuity conviction of defendant who paid part of a federal prison camp administrator's expenses during vacation because the administrator was in a position from which he could affect the conditions of confinement of the defendant's father, an inmate at the prison); *United States v. Umans*, 368 F.2d 725, 730 (2nd Cir.1966), *cert. denied*, 389 U.S. 80, 88 S.Ct. 253, 19 L.Ed.2d 255 (1967) (the court upheld gratuity conviction of CPA because of payments to IRS agents who disallowed a lesser portion of deductions than otherwise would have been disallowed).

donor by the donee . . . " *Evans*, 572 F.2d at 480.[10] The court therefore denies Sun-Diamond's motion to dismiss Count I of the indictment.

B. Thing of Value

I. Introduction

Sun-Diamond moves this court to dismiss count II of the indictment because it fails to allege that Sun-Diamond provided a "thing of value" to Secretary Espy. Rather, Sun-Diamond states that count II alleges that Sun-Diamond provided money to Secretary Espy's girlfriend. According to Sun-Diamond, the gratuity statute does not criminalize its conduct because the "thing of value" was not given directly to Secretary Espy. Sun-Diamond's construction of the term "thing of value," is, however, too narrow. A "thing of value" can constitute both tangible benefits, such as money, and intangible benefits, such as companionship. Because Secretary Espy received an intangible benefit from Sun-Diamond's gift to his girlfriend, Sun-Diamond's motion to dismiss count II on this basis shall be denied.

2. Analysis

Count II of the indictment alleges that Sun-Diamond Senior Vice President Richard Douglas arranged for Secretary Espy's girlfriend, Patricia Dempsey, to accompany them to Athens, Greece for a meeting of the International Nut Council (Council), whose members include Diamond Walnut, a member cooperative of Sun-Diamond. According to the indictment, the Council worked to expand the worldwide consumption of tree nuts. The indictment states that the Council thought it important to have Secretary Espy speak to

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[10] As the *Brewster* court recognized, the gratuity statute covers a wide range of conduct because it is directed at the behavior of public officials "who should exercise extraordinary caution to avoid acts potentially violative of their public trust[.]" *Id.* at 77-78.

its members at the IX World Tree Nut Congress held in Athens, Greece. The indictment alleges that Diamond Walnut wanted to use the Council to increase its exports. Count II alleges that Mr. Douglas, acting on behalf of Sun-Diamond, provided $3,100 in cash to Ms. Dempsey to cover the cost of her business class airplane ticket to Greece, and as such provided a benefit to Secretary Espy. The International Nut Council, the indictment alleges, reimbursed Mr. Douglas for these expenditures.

Secretary Espy received a benefit, albeit an intangible one, as a result of the actions allegedly taken by Mr. Douglas on behalf of Sun-Diamond. The term "thing of value" is a term of art which courts have interpreted broadly. It has been repeatedly used by Congress in many criminal statutes. *United States v. Girard*, 601 F.2d 69, 71 (2d Cir.), *cert. denied*, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979).[11] Since the term is not defined in the gratuity statute, the court must assume that the ordinary meaning of the words express the legislative purpose behind them. *Russello v. United States*, 464 U.S. 16, 17, 104 S.Ct. 296, 297, 78 L.Ed.2d 17 (1983).

The purpose of the gratuity statute is to cover all instances in which a public official may be improperly influenced by the receipt of an object of value because of his or her status. *Evans*, 572 F.2d at 480. Pursuant to the statute, Congress sought to punish the misuse of public office. *United States v. Williams*, 705 F.2d 603, 623 (2d Cir.), *cert. denied*, 464 U.S. 1007, 104 S.Ct. 524, 525, 78 L.Ed.2d 708 (1983). To fully implement Congress' policy judgment, the term "thing of value" must be broadly construed. *Gorman*, 807 F.2d at 1305. In analyzing whether an official received a thing of value, the focus should be on the value the official

[11] The court has found nothing in the legislative history of the gratuity statute that suggests Congress intended the term thing of value to be construed more narrowly than in other criminal statutes that employ the term.

"subjectively attaches to the items received." *Id.* at 1305 (citing *Williams*, 705 F.2d at 623).

Courts have found the term to encompasses tangible, as well as intangible benefits. *Id.* For instance, under the gambling statute, amusement has been judicially interpreted to constitute a thing of value. *Girard*, 601 F.2d at 71 (citing *Giomi v. Chase*, 47 N.M. 22, 132 P.2d 715, 716-17 (1942)); *Hightower v. State*, 156 S.W.2d 327, 328 (Tex. Civ. App. 1942). Courts have also found the testimony of an important government witness to be a "thing of value." *United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir.1974). Information can also be a thing of value. "For instance, state secrets might trade hands without cash consideration. Information obtained for political advantage might have value apart from its worth in dollars. In each case the information sought would have value to others, in addition to the seeker." *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir.1980) (emphasis supplied). In *Sheker*, the defendant was convicted of impersonating a federal officer in order to obtain a thing of value: The whereabouts of a witness against the defendant. *Id.* at 608-609. The court, in interpreting the term "thing of value" noted that the witness would also see a thing of value implicated--maintaining his whereabouts unknown to the defendant. *Id.* at 609. In addition, "[t]he criminal justice system, concerned with the safety of witnesses, has a similar interest." *Id.* Contrary to Sun-Diamond's implication, a thing of value does not necessarily require a direct benefit to the recipient but also includes a potential benefit to third parties.

In sum, an expansive construction of the term is necessary because "monetary worth is not the sole measure of value." *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir.1992), *cert. denied*, 507 U.S. 1034, 113 S.Ct. 1856, 123 L.Ed.2d 478 (1993) (citing *United States v. Schwartz*, 785 F.2d 673, 679 (9th Cir.1986)).[12] The fact that the alleged

[12] In *Nilsen*, the court concluded that the term "thing of value" included intangible objectives, such as a defendant's attempt to extort a witness' testimony linking him to two pending state bank robbery charges.

gratuity benefited someone other than the public official is not dispositive. As a result, count II sufficiently alleges that Sun-Diamond improperly provided a thing of value to Secretary Espy. Specifically, the indictment alleges that Sun-Diamond thing provided money to Ms. Dempsey so that she could accompany Secretary Espy on his trip to Greece. In addition, the OIC contends that at trial it will establish, *inter alia*, that a portion of the $3,100 was used by Secretary Espy to pay his credit card bill which included the charge for Ms. Dempsey's airline ticket. This alleged benefit, coupled with any other intangible benefit that Secretary Espy may have received, including Ms. Dempsey's companionship, warrants the submission of this matter for the jury to determine whether in fact Secretary Espy received a benefit. *See United States v. McDade*, 827 F.Supp. 1153, 1175 (E.D.Pa.1993), *aff'd*, 28 F.3d 283 (3d Cir.), *cert. denied*, --- U.S. ----, 115 S.Ct. 1312, 131 L.Ed.2d 194 (1995) (holding that the question of whether a member of Congress benefited personally from scholarship payments to his son is one which should be resolved by the jury; not the court in a pretrial motion). Accordingly, count II properly alleges that Sun-Diamond provided something of value to Secretary Espy.[13]

Sun-Diamond also contends that the conduct alleged in count II and engaged in by Mr. Douglas cannot be imputed to Sun-Diamond because Mr. Douglas provided payment to Ms. Dempsey and the International Nut Congress reimbursed Mr. Douglas. Sun-Diamond therefore argues that it is not implicated in the allegations set forth in count II. The

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Id. at 543. The Second Circuit, in a broad construction of the term thing of value, interpreted it to include commercially worthless stock which a defendant "believed" had value for himself. *United States v. Williams*, 705 F.2d 603, 623 (2d Cir.), *cert. denied*, 464 U.S. 1007, 104 S.Ct. 524, 525, 78 L.Ed.2d 708 (1983).

[13] Sun-Diamond also argues that count II must be dismissed because it fails to allege that a nexus between the purported gratuity and a specific official act existed. As the court, however, discussed in part II.A.2.*supra*, no such nexus need be alleged by the indictment.

indictment, however, need not be so explicit. There is no need for the government to set out in full, its "theory of proof" in the indictment. *United States v. Edmond*, 924 F.2d 261, 269 (D.C. Cir. 1991). The indictment must only state "the essential facts constituting the offense, not how the government plans to go about proving them." *Id.* (citing Fed.R.Crim.P. 7(c)(1)). Rule 7(c)(1) states, in pertinent part, "the indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." In this case, count II of the indictment sufficiently alleges that Mr. Douglas, an officer of Sun-Diamond, provided Ms. Dempsey $3,100 to defray the cost of her airline ticket to Greece. The fact that Mr. Douglas was reimbursed by the Council and not Sun-Diamond does not mean that Mr. Douglas' conduct cannot be imputed to Sun-Diamond, as Sun-Diamond maintains. Diamond Walnut, one of the owners of Sun-Diamond, and its President were members of the Council's Executive Committee. Mr. Douglas, a Sun-Diamond Vice President, undertook actions which arguably benefited Diamond Walnut, and as a result, Sun-Diamond.

C. Vagueness

Sun-Diamond moves this court to dismiss counts I and II because the allegations set forth in those counts do not distinguish between innocent gift giving and legitimate business related conduct on the one hand, and illegal gratuities on the other. Sun-Diamond thus argues that the gratuity statute is void for vagueness as applied to Sun-Diamond's conduct.[14] Sun-Diamond contends that under the gratuity statute, the offender must give the thing of value in order to reward the official, in this case, Secretary Espy, for actions he had taken or was committed to take. Sun-Diamond avers that since the facts, as set forth in counts I and II, do not

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[14] Sun-Diamond does not maintain that the gratuity statute is, on its face, over broad. Such a challenge was rejected by the court in *Brewster*, 506 F.2d at 76-78.

contain such allegations, the gratuity statute cannot be read by the court as reaching Sun-Diamond's conduct. Sun-Diamond argues that absent this intent to reward a public official, the gratuity statute, as applied to Sun-Diamond's conduct, would be transformed from a general intent criminal statute to a strict liability one by punishing the mere provision of things of value to public officials.

The question of whether Sun-Diamond's reason for providing the gratuities to Secretary Espy was an innocent one and not motivated because of his official position is one that should be entertained by the jury. The gratuity statute does not require the government to prove specific intent, nor does it require proof of a *quid pro quo*. *See Baird*, 29 F.3d at 652 (citing *Brewster*, 506 F.2d at 72-74 n.26). As previously discussed by the court, the OIC is not required to show that Sun-Diamond intended to reward Secretary Espy for actions he had undertaken or had committed himself to undertake.

The gratuity statute requires that the gratuities be given to an appointed official "for or because of official acts" performed or to be performed by the appointed official. Consequently, to find Sun-Diamond guilty under the gratuity statute, the jury needs only to conclude that Sun-Diamond provided the gratuities to Secretary Espy because of his status as an appointed official; and not merely for innocent reasons, such as friendship.[15] In other words, the OIC must demonstrate that Sun-Diamond knew that it was providing the gifts to Secretary Espy not solely for the sake of friendship, or some other innocent reason, but instead, because of Secretary

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[15] In *Standefer*, the court, in determining whether the defendant had been properly convicted of receiving illegal gratuities, stated:

> All that was required in order to convict [the defendant] was that the jury conclude that the gifts were given by him for or because of [the government official's] official position, and not solely for reasons of friendship or social purposes.

610 F.2d at 1080.

Espy's position.[16] The language of the statute and the cases that interpret it provided Sun-Diamond with sufficient notice of the prohibited conduct. As a result, the statute is not void for vagueness as it relates to Sun-Diamond's purported conduct. Accordingly, Sun-Diamond's motion to dismiss counts I and II based on this ground is denied.

D. The Independent Counsel's Jurisdiction

1. Introduction

Sun-Diamond moves this court to dismiss counts III through IX of the indictment on the basis that the violations alleged therein are outside the scope of the Independent Counsel's jurisdiction. Sun-Diamond maintains that the allegations in counts III through IX do not pertain to the subject matter of the Independent Counsel's investigation, namely, the alleged acceptance of improper gratuities by Secretary Espy. Sun-Diamond argues that because counts III through IX do not specifically relate to the subject of gratuities, the Independent Counsel exceeded his jurisdiction. Sun-Diamond contends that the Independent Counsel could only have referred the allegations set forth in counts III through IX to the Department of Justice for its consideration, or in the alternative, sought a referral from the Attorney General or Special Division over the allegations of wrongdoing contained in those counts. According to Sun-Diamond, since the OIC did not pursue either of these options, it exceeded its jurisdiction. The court, however, concludes that the Independent Counsel did not exceed its jurisdiction because the allegations set forth in counts III through IX are related to the core subject matter of the OIC's

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[16] The statute does not, as Sun-Diamond contends, criminalize all things of value that are provided to appointed officials without regard as to the reason. The OIC must establish that Sun-Diamond provided improper gratuities to Secretary Espy *because* of his status as an appointed official.

investigation and thus fall properly within the Independent Counsel's jurisdiction.[17]

2. Analysis

Counts III through IX of the indictment allege that Sun-Diamond made illegal campaign contributions to the congressional election campaign of Secretary Espy's brother, Henry Espy. Specifically, the indictment alleges that as a result of Henry Espy's unsuccessful campaign for the Democratic Party nomination to the seat vacated by his brother when he became Agriculture Secretary, Henry Espy incurred campaign debts. To help retire these debts, the indictment alleges that Mr. Douglas, at the time a Senior Vice-president of Sun-Diamond and James H. Lake, a principal of the D.C. public relations firm of Robinson-Lake, together devised a scheme to enable Sun-Diamond to make unlawful corporate contributions in the name of another. To effectuate this contribution, the indictment alleges that Mr. Douglas and Mr. Lake agreed that Mr. Lake would obtain $1,000 contribution checks from several Robinson-Lake employees. Robinson-Lake then invoiced Sun-Diamond for a false and fictitious expense sufficient to cover the contributions. Sun-Diamond's payment of the false expense was purportedly used to reimburse the individuals making the campaign contributions.

The Ethics in Government Act, 28 U.S.C. § 591, *et. seq.*, authorizes the Attorney General to investigate high-ranking federal executive officials, national campaign committee officials, or persons who present a personal, financial, or political conflict of interest to the Executive Branch. *Id.* at §§ 591(b) and (c). These persons are referred to as "covered persons," because they are explicitly covered by the Act. *See United States v. Tucker*, 78

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[17] The court notes that the jurisdiction of the Independent Counsel has inspired extensive treatment. Specifically, "the jurisdiction of the Independent Counsel . . . has already been tested in district court by forty- three motions." *In re Espy*, 80 F.3d 501 (D.C. Cir. 1996).

F.3d 1313, 1322 (8th Cir.1996). Under the Act, the Attorney General, "upon completion of a preliminary investigation," may apply to the Special Division for the appointment of an independent counsel. 28 U.S.C. § 591(c)(1)(A). In the application, the Attorney General is to provide "sufficient information to assist the division of the court . . . in defining [the] independent counsel's prosecutorial jurisdiction so that the independent counsel has adequate authority to fully investigate and prosecute the subject matter and all matters related to that subject matter." *Id.* at § 592(c).

The Special Division, in delineating the independent counsel's prosecutorial jurisdiction, must "assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of counsel, and all matters related to that subject matter." *Id.* at § 593(b)(3). The independent counsel is also to have the jurisdiction to investigate and prosecute crimes that "may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made . . ." *Id.*

On August 8, 1994, the Attorney General submitted an application to the Special Division for the appointment of an independent counsel, "to investigate whether any violations of federal criminal law were committed by Secretary of Agriculture" Espy. *In re Alphonso Michael (Mike) Espy*, Application for Appointment of an Independent Counsel, No. 94-2, at 1 (Aug. 8, 1994). The Attorney General's preliminary investigation developed evidence that Secretary Espy had received gifts from Tysons Foods, a major poultry processing corporation headquartered in Arkansas, with a number of pending regulatory issues before the Department of Agriculture. *Id.* at 2. In addition, the Attorney General concluded that Secretary Espy allegedly received gifts from other organizations and individuals with business matters pending before the Department of Agriculture. *Id.*

On September 9, 1994, the Special Division, pursuant to 28 U.S.C. § 593(b), appointed Donald C. Smaltz Independent Counsel to investigate

> to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether [Secretary Espy] has committed a violation of any federal criminal law . . . relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture.

In re Alphonso Michael (Mike) Espy, Div. 94-2, Order at 1-2 (D.C. Cir. Sp. Div. Sept. 9, 1994).

The Special Division further vested the Independent Counsel with authority to investigate

> other allegations or evidence of violations of any federal criminal law . . . by any organization or individual developed during the Independent Counsel's investigation . . . and connected with or arising out of that investigation.

Id. at 2. The Independent Counsel was also given the authority

> to seek indictments and prosecute any organization or individuals involved in any of the matters [outlined in the order], who are reasonably believed to have committed a violation of any federal law arising of such matters, including organizations or individuals who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

Id. Finally, the Independent Counsel was to

> . . . fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel . . . and all matters

> and individuals whose acts may be related to that subject matter . . .

Id. at 3.

On September 14, 1994, after the appointment of the Independent Counsel, the Attorney General referred to him a related matter under 28 U.S.C. § 594(e). The referred matter was the allegation that "Secretary Espy hosted a fundraising dinner, attended by agricultural lobbyists, the purpose of which was to retire the campaign debt of his brother." *Notice of Prosecutorial Jurisdiction*, at 2.

The issue before the court is whether the allegations set forth in counts III through IX are related to the subject matter originally identified by the Attorney General in its application for the appointment of an independent counsel or in the subsequent referral. Preliminarily, the court notes that the OIC is not limited in its investigation to those persons that are explicitly covered by the Act. *Tucker*, 78 F.3d at 1322. The important issue is whether the persons or organizations and the matters being pursued by the OIC are related to the original subject matter of the OIC's investigation. "To demonstrate that one occurrence is 'related' to another, [the OIC] need only show that there is a reasonable causal or logical connection between the two, some tenable correlation between events." *Secord*, 725 F.Supp. at 566.

The court concludes that the Independent Counsel has not exceeded his jurisdictional mandate because the counts in question are related to the original subject matter of the investigation. In essence, counts III through IX charge that Sun-Diamond sought to gain improper influence with Secretary Espy by providing money to help retire Henry Espy's campaign debt.[18] This factual predicate is intertwined

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[18] Indeed, Mr. Lake, who has entered a guilty plea before this court, admitted at the plea proceeding that Mr. Douglas advised him that Secretary Espy desired the help of Mr. Douglas in raising money to help retire Henry Espy's campaign debt. The Attorney General's September 14, 1994, referral also dealt with

with the original core subject matter of the Attorney General's investigation, as well as the subsequent related referral dealing with the allegations that Secretary Espy hosted a fundraising dinner to help retire his brother's campaign debt. The Attorney General's original investigation and request for appointment sought to determine whether certain individuals or organizations with business matters pending before the Agriculture Department improperly influenced Secretary Espy. "Obviously, the concern motivating such an investigation is that a cabinet Secretary may have been influenced improperly to favor or intervene in the gift-givers' causes pending before his or her Department." *In re Espy*, 80 F.3d 501, 508 (D.C. Cir.1996). Similarly, the allegations of counts III through IX present the alleged scenario that Secretary Espy was improperly influenced because of his status by individuals or organizations with matters before the Department of Agriculture. The court's conclusion is supported by *In re Espy* and *United States v. Tucker*, 78 F.3d 1313 (8th Cir.1996).[19]

Secretary Espy's effort to retire his brother's campaign debt. The scheme that Mr. Lake and Mr. Douglas allegedly entered into is therefore closely related to the subject matter of the referral. Importantly, the referral does not include a reference to any gratuity. This fact undermines Sun-Diamond's argument that count III through IX do not mention the subject of gratuities, and as such, the allegations contained therein are beyond the OIC's jurisdiction.

[19] Although these two cases involved the issue of referral, they are nevertheless directly applicable to this case. This is so because this court faces the same task the courts in those cases encountered. Namely, the court must interpret the independent counsel's original grant of prosecutorial jurisdiction. As the court in *In re Espy* stated:

> In referring a relating matter, this court is *interpreting*, but not expanding, the independent counsel's jurisdiction over a matter that was implicitly included in the original grant of prosecutorial jurisdiction, thus permitting the court to make explicit the independent counsel's jurisdiction over a matter that was implicitly included in the original grant of prosecutorial jurisdiction.

In re Espy, the independent counsel, Donald C. Smaltz, sought a referral of a related matter under section 594(e) of the Ethics in Government Act. He sought a referral over-alleged "violations of federal criminal law by associates of Secretary Espy in matters related to the original grant of jurisdiction wherein the persons involved, patterns of conduct, witnesses, underlying facts, and applicable law overlap with" his original investigation. *Id.* at 503-504. The court granted the application for referral, noting that the independent counsel had

> identified evidence allegedly showing a pattern of conduct involving payment or gifts to Espy *and his close associates* in return for favorable treatment by the Department of Agriculture, which was developed during the [Independent Counsel's] original investigation of Secretary Espy's acceptance of gifts from parties with business pending before the Department of Agriculture[.][20]

Id. at 507 (emphasis added). This is precisely the same task this court has endeavored to meet.

[20] The referral order in In re Espy demonstrates to this court the expansive reading of the Independent Counsel's jurisdiction given by the Special Division. The Special Division referred the following matter to the Independent Counsel pursuant to 28 U.S.C. § 594(c):

> The jurisdiction and authority to investigate and prosecute any violation of any federal law . . . by any organization or individual, related to any application, appeal, or request for subsidy made to or considered by the United States Department of Agriculture, for which Secretary of Agriculture Alphonso Michael (Mike) Espy and/or his Chief of Staff Ronald Blackley intervened in the application, approval, or review process.

In re Alphonso Michael (Mike) Espy, Div. 94-2, Order at 1 (D.C. Cir. Sp. Div. April 1, 1996).

The order does not contain a specific mention of any unlawful gratuity made directly to Secretary Espy. This fact also undermines Sun-Diamond's argument that because counts III through IX do not

Id. at 509.[21] Similarly, counts III through IX allege that Sun-Diamond engaged in a pattern of unlawful conduct that sought to benefit one of Secretary Espy's closest associates, his brother. In addition, the OIC has presented evidence that Secretary Espy was actively involved in soliciting contributions to retire his brother's campaign debt.[22]

In *United States v. Tucker*, the court also recognized the broad nature of an independent counsel's jurisdiction. In that case, the Independent Counsel was originally vested with jurisdiction to investigate the relationship of the President of the United States and the First Lady to a savings and loan association and a land development corporation. The issue before the court was to determine the propriety of a referral to the Independent Counsel. The referral sought to grant the Independent Counsel with jurisdiction to investigate another separate, corporation. As a result of the referral, the governor of Arkansas, his attorney, and the governor's business partner were indicted. The indictment was the subject of the appeal.

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specifically allege that it gave Secretary Espy an improper gratuity, the OIC exceeded its jurisdiction.

[21] The court rejected the Department of Justice's arguments against referral. The Department of Justice's position was similar to the one presently taken by Sun-Diamond. It contended that the matter for which the independent counsel sought referral was not sufficiently related to his original prosecutorial jurisdiction

> because the connection between the alleged wrongdoing by Secretary Espy's associates and the improper acceptance of gifts by Espy [was] too speculative . . . The proper course in [the Department of Justice's] view [was] for IC Smaltz to allow [it] to investigate the new matters and determine whether to prosecute any federal offense it may discover.

Id. at 508. This is analogous to the argument presently proffered by Sun-Diamond.

[22] Specifically, at Mr. Lake's guilty plea proceeding, the government's statement of facts (with which Mr. Lake agreed) stated that Mr. Douglas had told Mr. Lake that Secretary Espy wanted help in raising money to retire Henry Espy's campaign debt.

The court concluded that the referral was appropriate because it was sufficiently related to the Independent Counsel's original jurisdiction. The court so concluded because there was an overlap in the defendants and in the witnesses between the original prosecutorial jurisdiction and the referral jurisdiction. *Id.* at 1321. In addition, there was a defined relationship between the defendants. *Id.*

The *Tucker* court's reasoning is particularly applicable to this case.[23] In this case, the connection between the allegations set forth in counts III through IX and the subject matter of the independent counsel's original grant of jurisdiction is at a minimum as strong as the connection found by the court in *Tucker*. Counts I and II, which Sun-Diamond concedes fall within the OIC's original jurisdiction, involve perhaps the most important individual in the case, Mr. Douglas, the same individual that counts III through IX implicate. Moreover, there is a clearly defined relationship between Mr. Douglas and Secretary Espy alleged by all counts. Consequently, the court concludes that counts III through IX fall within the purview of the OIC's jurisdiction. Sun-Diamond's motion to dismiss counts III through IX of the indictment is therefore denied.

E. Wire Fraud

Sun-Diamond moves the court to dismiss count III of the indictment (wire fraud) because the alleged wire communication at issue did not further the execution of the alleged scheme that Mr. Douglas and Mr. Lake pursued. Count III alleges, in pertinent part, that:

> Defendant Sun-Diamond, acting through its Senior Corporate Officer [Richard Douglas], for the purpose of executing the aforesaid scheme and

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[23] Importantly, our court of appeals, in *In re Espy*, adopted the *Tucker* court's approach in determining whether two matters were related. *In re Espy*, 80 F.3d at 507.

> artifice to defraud, and attempting to do so, knowingly and willfully transmitted and caused to be transmitted in interstate commerce, by means of a wire communication, that is: a telephone call between [Mr. Douglas] and James H. Lake's office. . . in the District of Columbia, writings, signs, signals, pictures and sounds, that is among other things, a message that [Mr. Douglas] needed to speak with James H. Lake.[24]

The court must determine the sufficiency of a criminal indictment by examining the indictment on its face. *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir.1992). "The indictment is sufficient if it charges in the language of the [applicable] statute." *Id.*[25] The indictment must, however, set forth the essential elements of the alleged crime. *United States v. Cole*, 755 F.2d 748, 759 (11th Cir.1985). Presently, wire fraud requires proof of a scheme to defraud and the use of an interstate wire communication to further this scheme. *United States v. Maxwell*, 920 F.2d 1028, 1035 (D.C. Cir.1990).

In count III of the indictment, the OIC has sufficiently identified the elements of the charged offense. The sufficiency of the evidence is a matter to be left for the trial.

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[24] Count III refers to an illegal scheme allegedly devised by Mr. Douglas and Mr. Lake to enable Sun-Diamond to make unlawful corporate contribution to help retire Henry Espy's campaign debt.

[25] The wire fraud statute states, in pertinent part,

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1343 (West Supp.1996).

See Critzer, 951 F.2d at 307.[26] At trial, the OIC will have to establish that the use of the wire advanced or was integral to the execution of the fraud. *United States v. Vontsteen*, 872 F.2d 626, 629 (5th Cir.1989), *cert. denied*, 498 U.S. 1074, 111 S.Ct. 801, 112 L.Ed.2d 862 (1991). The government will have to establish that the wire communication was at a minimum "incident[al] to an essential part of the scheme." *Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1954) (elements of mail fraud).[27] The indictment, however, only need inform the defendant of the charge against him/her and enable the defendant to plead double jeopardy in any subsequent prosecution for the same offense. *Critzer*, 951 F.2d at 307. Count III of the indictment identifies the essential elements of the charged offense and provides Sun-Diamond with the requisite notice. Accordingly, Sun-Diamond's motion to dismiss count III is denied.

F. Intangible Right to Honest Services

Lastly, Sun-Diamond moves the court to dismiss, or in the alternative strike, the part of counts III and IV of the indictment that allege that Mr. Douglas and Mr. Lake sought to defraud both Robinson-Lake and Bozell Worldwide, Inc. of the intangible right to Mr. Lake's honest services.[28] Sun-Diamond maintains that count III and IV fail to allege that Mr. Douglas and Mr. Lake intended to cause Robinson-Lake

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[26] At trial, Sun-Diamond, can at the appropriate time, challenge the sufficiency of the evidence.

[27] The requisite elements of "scheme to defraud" under the wire fraud statute and the mail fraud statute are the same. Therefore, cases interpreting mail fraud apply equally to wire fraud. *United States v. Lemire*, 720 F.2d 1327, 1334-1335 n. 6 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 874 (1984).

[28] Robinson-Lake was a wholly-owned subsidiary of Bozell Worldwide, Inc. which in turn is owned by Bozell, Jacobs, Kenyon & Eckhardt, Inc., a Delaware corporation.

and Bozell Worldwide, Inc. a concrete economic business injury.[29]

The wire fraud statute requires the indictment to allege that the defendant engaged in a "scheme or artifice to defraud . . . " 18 U.S.C. § 1343. A "scheme or artifice to defraud" is a "scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. Sun-Diamond argues that section 1343 requires that the alleged deprivation threaten or cause harm to the victim's pecuniary interests. In support of this proposition, Sun-Diamond principally relies on *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 874 (1984). In *Lemire*, the court held that "an intentional failure to disclose a conflict of interest, without more, is not sufficient evidence of the intent to defraud an employer necessary under the wire fraud statute." *Id.* at 1337. The court found that to deprive another of the intangible right of honest services, the defendant's conduct must carry "a significant risk of identifiable harm to the employer apart from the loss of his employee's loyalty and fidelity." *Id.*

Lemire was decided prior to the enactment of section 1346.[30] The court there noted that "Congress had not defined

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[29] The indictment alleges that Mr. Douglas and Mr. Lake entered into a scheme to defraud Bozell Worldwide, Inc. of the intangible right of honest services of Mr. Lake by, among other things, creating a false expense report seeking reimbursement from Bozell Worldwide of money expended by Mr. Lake for the benefit of Sun-Diamond; falsifying financial records; and causing Bozell Worldwide to advance funds for the purpose of concealing an illegal corporate campaign contribution by Sun-Diamond to help retire Henry Espy's campaign debt.

[30] Section 1346 was enacted by Congress in November 1988 to overturn *McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, the Court held that Section 1343 did not criminalize schemes to defraud citizens of their right to honest government. Section 1346 extended the applicability of "scheme or artifice to defraud" to include "a scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." Congress, in enacting Section 1346 wanted "to reinstate all the pre-*McNally* case law pertaining to the mail and wire fraud statutes without

'scheme or artifice to defraud' when it first coined that phrase." *Id.* at 1335. Congress, however, has since defined the term and the indictment tracks the statutory language with sufficient factual specificity. In addition, *Lemire* dealt with what the jury had to find in order to sustain a conviction under Section 1343; not with what an indictment must allege on its face.[31] The court was concerned that disloyalty alone would become an indictable crime. *Id.* at 1336. In the present case, however, the government has not indicated any intention to make such an argument.

The government has, however, indicated that it will prove at trial, consistent with Lemire, that both Robinson-Lake and Bozell, Inc. suffered identifiable harm. Specifically, counts III and IV allege a risk to the reputation of both entities and as a result, a risk to their continued business prosperity.[32] The OIC also intends to prove at trial that this risk was foreseeable to Mr. Douglas and Mr. Lake.[33] Counts III and IV adequately allege violations of Sections 1343 and 1346.

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change." Senate Judiciary Committee, Section Analysis of Anti-Drug Abuse Act of 1988, 134 Cong.Rec. S17, 360- 02 (daily ed. Nov. 10, 1988); *see also United States v. Waymer*, 55 F.3d 564, 568 n.3 (11th Cir.), *cert. denied*, — U.S. —, 116 S.Ct. 1350, 134 L.Ed.2d 519 (1996) ("Congress' purpose in enacting § 1346 was to restore the mail fraud statute to its pre-*McNally* position . . . ").

[31] Sun-Diamond has not presented the court with any authority that requires a count charging an offense under Section 1343 to include an allegation that the wrongdoer intend some economic harm.

[32] "[A]lthough the scheme to defraud must threaten some cognizable harm to its target, that harm need not be a deprivation of tangible property or money; criminal fraud encompasses schemes to defraud persons of significant intangibles as well." *Lemire*, 720 F.2d at 1336 (citations omitted).

[33] In *Lemire*, the court stated that "[s]o long as the jury finds [an intentional failure to disclose a conflict of interest] furthers a scheme to abuse the trust of an employer in a manner that makes an identifiable harm to him, apart from the breach itself, reasonably foreseeable, it may convict the employee of wire fraud." *Id.* at 1337.

Consequently, Sun-Diamond's motion to dismiss, or in the alternative to strike portions of counts III and IV, is denied.

III. Conclusion

For the foregoing reasons, it is this 7th day of September 1996,

ORDERED that Sun-Diamond's motion to dismiss be and is hereby **denied**.

SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America

vs.

Sun-Diamond Growers of California, Defendant

Docket No. CR 96-0193 RMU
Washington, D.C.
Wednesday, September 18, 1996
9:21 a.m.

Volume 8
Transcript of Trial
Before the Honorable Ricardo M. Urbina
United States District Judge, and a jury

THE COURT: Ladies and Gentlemen, the time has now come when all of the evidence in the case is in and you will soon be hearing the closing arguments of counsel. It is now my responsibility to instruct you on the law that should control your deliberations in this case.

Let me begin by defining the functions of the various participants in this trial, but let me mention first, that you as jurors are the judges of the facts in this case, but in determining in what actually happened, that is, in reaching your decision as to the facts, it is your sworn duty to follow all of the instructions of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction or to question the wisdom or the correctness of any rule I may state to you. You must not substitute or follow your own notions or opinions as to what the law is or ought to be. It is your duty to apply the law as I explain it to you regardless of the consequences.

Now, it is also your duty to base your verdicts solely upon the evidence without prejudice, without bias and without sympathy. That was the promise that you made and the oath that you took before being accepted by the parties as jurors and they have the right to expect nothing less.

Thus, under your oath as jurors, you are not to be swayed by prejudice or bias or sympathy. You are to be guided solely by the evidence in this case. It is for you alone to decide whether the government has proved that the defendant is guilty of the crimes charged solely on the basis of the evidence and subject to the law as I charge you now. It must be clear to you that once you let prejudice, bias or sympathy interfere with your thinking, there is a risk that you will not arrive at a true and just verdict.

The parties in an action such as this are the government and the defendant. Every defendant in a criminal case is presumed to be innocent. This presumption of innocence remains with the defendant throughout the trial unless and until the defendant is proven guilty beyond a reasonable doubt.

The burden is on the government to prove the defendant guilty beyond a reasonable doubt. The burden of proof never shifts throughout the trial. This burden of proof requires that you look at the evidence carefully and thoughtfully and deliberately and the law does not require a defendant to prove his innocence or to produce any evidence in the case.

If you find that the government has proved beyond a reasonable doubt every element of an offense with which the defendant is charged, it is your duty to find the defendant guilty. On the other hand, if you find the government has failed to prove any element of an offense with which a defendant is charged, beyond a reasonable doubt, you must find the defendant not guilty.

Reasonable doubt as the name implies is a doubt based on reason. A doubt for which you can give a reason. It is such a doubt as would cause a juror after careful and candid

and impartial consideration of all of the evidence to be so undecided that he or she could not say that he or she has an abiding conviction of the defendant's guilt.

It is such a doubt as would cause a reasonable person to pause or hesitate in the graver or more important transactions of life. However, it is not a fanciful doubt nor is it a whimsical doubt nor a doubt based on conjecture. It is a doubt based on reason.

The government is not required to establish guilt beyond all doubt or to a mathematical certainty or to a scientific certainty. Its burden is to establish guilt beyond a reasonable doubt.

The parties, the government and the defendant, are represented by lawyers. The function of counsel is to shape the presentation of evidence for his or her respective client and to monitor the evidence as it comes into the case so that the lawyer can protect the legal rights of his or her client.

The statements and arguments of lawyers are not evidence. They are intended to assist you in understanding the evidence. If any reference by attorneys to evidence does not coincide with your recollection of the evidence, it is your memory, not the recollection of counsel, that will control during your deliberations.

Moreover, occasionally during arguments a lawyer for one side or the other may appear to be stating his or her beliefs or personal opinions concerning the facts in the case or the credibility of the witness or witnesses. Of course, this would be improper. Lawyers' personal beliefs or opinions have no place in the trial. They are not proper argument.

Rather counsel are permitted only to argue to you based upon what the evidence in the case has shown. If you think a lawyer comes to express his or her personal beliefs during an argument, you should disregard such expressions and judge the case only on the evidence.

Now, in the course of monitoring the evidence, the lawyers in the case may sometimes object when the other side has asked a question or made an argument or offered evidence which the objecting lawyer believes is not properly admissible.

You must not be prejudiced in any way against a lawyer who makes such objections. It is the lawyer's responsibility to make a judgment about when to make objections, and when counsel makes objections, he or she is doing so pursuant to the function that he or she performs.

Now, if such an objection has been made and I have sustained the objection made by counsel, that means that you disregard the question and you must not speculate as to what the answer might have been.

After a witness answer a lawyer's question, I have ruled that the answer should be stricken, you should disregard both the question and the answer in your deliberations. Likewise, as to exhibits, if I have sustained an objection or if I've ordered an exhibit stricken, then that means that it is not evidence in the case and you must not consider it as evidence in the case during your deliberations.

Now, the function of the court is to conduct the trial of the case in an orderly, fair and efficient manner. To rule on the questions of law that arise during the course of the trial and then to instruct you on the law which applies in the particular case.

The actions which I have taken during the trial in ruling on motions or objections by counsel, or in comments to the lawyers or in questions or comments to witnesses or even in setting forth the law in these or any other instructions I have given you, are not to be taken by you as any indication of my opinion as to the credibility of the witness or witnesses or how you should decide any particular fact or facts.

As I told you at the beginning of the trial, you may not take anything I might have said or done as indicating how I

think you should decide this case. If you believe that I have expressed or indicated any opinion about the facts, you should ignore it. It is your sole and exclusive function to decide the verdict in this case.

Like the lawyers, if any reference I have made to the evidence does not coincide with your memory of the evidence, it will be your memory, not mine that controls during your deliberations.

Now, your function, ladies and gentlemen, is to be the judges of the facts. You are to determine what the facts are in this case. You are the sole judges of the facts and in performing that function, you alone, will decide what weight to give to the evidence presented during this trial. You will decide the value of the evidence and the believability of every single witness who has appeared before you.

You should determine the facts in this case without prejudice, without fear, without sympathy or favoritism. You should not be improperly influenced by anyone's race, ethnic origin or gender. You will decide this case solely from a fair consideration of the evidence.

In the course of your deliberations on the facts, it is your duty to accept the law as I have stated it to you. You may not ignore any instruction or question the wisdom of any rule of law.

Now, the reason the parties, the lawyers, the judge and the jury come together in a trial is to consider the evidence in making a decision. Now, during their deliberations you may consider only the evidence properly admitted in this trial. The evidence in this case has consisted of sworn testimony of witnesses and exhibits which have been admitted into evidence. If during the trial I have sustained an objection to an exhibit as I indicated earlier, that exhibit is not evidence in the case.

Now, during your deliberations you may consider only the evidence which has been properly admitted in the trial and

that evidence, as I've indicated, has come in a number of forms in this case. One of the forms that evidence has been presented to you in is something called testimony stipulated to by the parties.

Now, during the trial you were that the parties had stipulated, that is, had agreed to certain facts. Any stipulation of fact is undisputed evidence, and you may consider it undisputed evidence.

Now, during the trial you were told as well that the parties had stipulated, that is agreed to, what testimony a particular witness would have given had that witness testified in the case. Now, you are to consider this stipulated testimony as exactly what this witness would have said had the witness actually testified.

When you consider the evidence, you are permitted to draw, from the facts, which you find have been proved, such reasonable inferences as you feel are justified in light of your own human experience.

There are two types of evidence from which you may find the facts of this case. There is direct evidence and there is circumstantial evidence.

Now, when a witness asserts actual knowledge of a fact such as an eye witness, that testimony is considered to be direct evidence of whatever it is the witness has observed. On the other hand, when there's been a chain of facts and circumstances which indicate the guilty or the innocence of the defendant that is called circumstantial evidence and the law makes no distinction between the weight you should give to either kind of evidence in this case.

For example, if you go home one evening and it is dry and cool and you go to bed and you wake up in the middle of the night and you look at the window and as you glance out the window and you see that it's raining, well, the next day that would be direct evidence of the fact that during the night hours, it rained. You saw it rain.

On the other hand, suppose you sleep through the night. You don't wake up and you wake up the next morning and it is not raining, but the streets are all wet, well, that may very well be circumstantial evidence of the fact that during the night hours while you slept, it rained, even though you did not see it rain. That would be circumstantial evidence.

Charts or summaries have been prepared by counsel and by the parties and shown to you during the trial of this case for the purpose of explaining facts that are allegedly contained, for example, in books and records and other documents which are in evidence in the case. Such charts or summaries are not evidence in this trial or proof of any fact.

If you find that these charts or summaries do not correctly reflect facts or figure shown by the evidence in the case, the jury should disregard the charts or summaries. In other words, such charts or summaries are used only as a matter of convenience for you and to the extent that you find they are not in truth summaries or facts or figures shown by the evidence itself in the case, you can disregard them entirely.

Now, on the other had there have been some charts or summaries prepared by the parties in this case and by counsel that have been admitted into evidence and have been shown to you during the course of the trial for the purpose of explaining facts that are allegedly contained in books, records, other documents which are in evidence.

You may consider charts and summaries that have been admitted into evidence as you would any other evidence in the case. You may consider the charts and summaries as you would any other evidence admitted during the trial and give these charts and summaries such weight or importance, if any, as you feel they deserve.

Now the rules of evidence ordinarily do not permit witnesses to testify as to their own opinions or their own conclusions about issues in the case. Sometimes witnesses are permitted to give their own opinions about matters and

one of the exceptions is the exception that applies to the testimony of a person who is presented as an expert witness in the case.

Now an expert witness is someone who, by education or by experience, may have become knowledgeable in some technical, scientific or very specialized area. If such knowledge or experience may be of assistance to you in determining some of the evidence or in determining a fact, an expert witness in that area may state an opinion as to relevant and material matter in which that expert witness claims that he or she is an expert.

Now, you are not bound by the opinion of an expert. You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. You should consider the testimony of expert witnesses just as you consider the evidence in this case.

If you should decide that the opinion of an expert witness is not based upon sufficient education or experience or if you should conclude that the reasons given in support of the opinion are not sound, or if you should conclude that the opinion is outweighed by other evidence, you may disregard the opinion in part or in its entirety. As I have mentioned repeatedly, you the jury, ladies and gentlemen, are the sole judges of the facts in this case.

Now in determining whether the government has established the charges against the defendant beyond a reasonable doubt, you must consider and weigh the testimony of all of the witnesses who have appeared before you including whatever representatives or persons claimed to be representatives of the defendant.

Now, you are the sole judge of the credibility of the witnesses in this case. In other words, you alone are to determine whether to believe any witness and the extent to which any witness should be believed. In reaching a conclusion as to the credibility of any witness, you may consider any matter that may have a bearing on the subject.

You may consider, for example, the demeanor and the behavior of the witness on the witness stand; the witness' manner of testifying; whether the witness impresses you as a truthful person; whether the witness impresses you as having an accurate memory and recollection; whether the witness has any motive for not telling the truth; whether the witness had a full opportunity to observe the matters about which he or she has testified; whether the witness has any interest in the outcome of the case, or friendship or animosity toward other persons concerned with the case.

Now, inconsistencies -- well, let me mention before I get into inconsistences, that you have heard the evidence that Mr. James H. Lake has made a plea agreement with the government. His testimony was received in evidence and may be considered by you. You may give his testimony such weight as you think it deserves, whether or not his testimony may have been influenced by the plea agreement is for you to determine. The witness' guilty plea cannot be considered by you as evidence of the defendant's guilty. The witness' guilty plea can be considered by you only for the purpose of determining how much, if at all, to rely upon the witness' testimony.

Persons characterized as accomplices in the commission of a crime are competent witnesses and the government has a right to use them as witnesses. An accomplice is anyone who knowingly and voluntarily cooperates with, aids, assists, advises or encourages another person in the commission of a crime regardless of his or her degree of participation.

The testimony of an alleged accomplice should be received with caution and scrutinize with care. You should give it such weight as in your judgment it is fairly and entitled to receive. You may convict the defendant upon the uncorroborated testimony of an alleged accomplice only if you believe that the testimony of the accomplice proves the guilt of the defendant beyond a reasonable doubt.

You also heard that witnesses or a witness in this case has received immunity. What this means that the testimony of a witness may not be used against that witness who has testified in a criminal case.

Now, you should consider whether testimony may be colored in such a way as to further the witness' own interests or a witness who realizes that he or she may obtain his or her own freedom by incriminating another has a motive to lie.

However, you may also consider that the witness is under the same obligation to tell the truth as is any other witness because the grant of immunity does not protect that witness against a prosecution for perjury or false statement he or she may make under oath.

Now, the testimony of a witness as to whom immunity has been granted should be received with caution and scrutinized with care. You should give the testimony such weight as in your judgment it is fairly entitled to receive.

Now, false or inconsistent statements that a defendant makes in explanation or defense, after a crime has been committed, do not create a presumption of guilt. You may consider evidence of such false or inconsistent statement, however, as tending to prove the defendant's consciousness of guilt, but you are not required to do so.

You should consider and weight evidence of the defendant's false or inconsistent statements, if any exists, with all of the other evidence in the case and then give it such weight as you believe it is fairly and entitled to receive.

A false and inconsistent statement must have been made by a Sun-Diamond officer, employee or agent acting in his or her capacity as such an officer, employee or agent.

Now, inconsistencies or discrepancies in the testimony of any witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it differently. An innocent misrecollection, like a

failure to recall, is not an uncommon experience. In weighing the effect of the inconsistency or the discrepancy, always consider whether it pertains to a matter of important or unimportant detail and whether the inconsistency or discrepancy results from innocent error or intentional falsehood.

In your consideration of the evidence, you are not limited solely to what you saw and heard as the witnesses testified or as exhibits were admitted into evidence. You may consider the reasonableness or unreasonableness, the probability or improbability, of the testimony of a witness in determining whether to accept it as true and accurate. You may consider whether the witness has been contradicted or corroborated by other credible evidence in the case.

Now, if you believe that any witness has shown him or herself to be biased for or prejudiced against either side in this trial, you may consider and determine whether such bias or prejudice has colored the testimony of such witness so as to affect the desire and capability of that witness to tell the truth. Now, you should give the testimony of each witness such weight as in your judgment it is fairly entitled to receive.

Now, the weight of the evidence, ladies and gentlemen, is not necessarily determined by the number of witnesses testifying for either side. Rather, you should consider all of the facts and circumstances in evidence to determine which of the witnesses you believe. You may find the testimony of a smaller number of witnesses on one side is more believable than the testimony of a greater number of witnesses on the other side or you may find to the contrary.

Turning now to the charges and a few general remarks. First, ladies and gentlemen, the indictment is merely a formal way of accusing a person of a crime so that that person may be brought to trial. You must not consider the indictment as evidence of any kind. You may not consider it as evidence of the defendant's guilt or draw any inferences of guilt simply because the defendant has been indicted.

Second, you must not allow the nature of the charge or charges to affect your verdict. You must consider only the evidence that has been presented in this case in rendering a fair and impartial verdict.

Now, as to the charges in the case, ladies and gentlemen, the defendant is charged in an indictment which I will discuss shortly. In order to prove the defendant guilty, the government must prove beyond a reasonable doubt all of the elements of the particular charge or charges that are contained within the indictment.

I'm going to now briefly summarize the counts in the indictment rather read the entire indictment to you and I will give you some general information and then some specific information. As you know, the indictment charges nine separate offenses called counts.

Now, a separate offense is charged in each count of the indictment which you will consider. Each offense and the evidence which applies to it should be considered separately and you should return separate verdicts as to each count, unless I otherwise instruct you.

The fact that you may find a defendant guilty or not guilty on any one count of the indictment should not control or influence your verdict with respect to any other count or counts in the indictment.

You will note when and if you review the indictment that the indictment charges offenses that were committed "on or about" January the 5th, 1993 through "on or about" June of 1994. The proof need not establish with certainty the exact date of the alleged offenses. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense were committed on a date reasonably near the date alleged.

You may consider, ladies and gentlemen, this case as I have instructed you and you may find the defendant guilty of the crime charged in a particular count or counts in the

indictment without finding that it personally, it, meaning the defendant, it personally committed each of the acts that make up the crime or that its officers, employees or agents were present while the crime was being committed.

Any person or company who, in some way, intentionally participates in the commission of a crime, aids and abets the principal offender. It, therefore, is as guilty of the crime as if it would be if its officers, employees or agents had personally committed each of the acts that make up the crime.

To find the defendant aided and abetted in committing the crime, you must find that the defendant knowingly associated itself with persons who committed the crime, that it participated the crime as something it wished to bring about and that it intended by its actions to make it succeed.

Some affirmative conduct by the defendant to help in the planning or carrying out the crime is necessary. The government is not required to prove that anyone discussed or agreed upon a specific time or method of committing the crime, nor need the government prove that the principal offender and the person or company alleged to be the aid or an abetter directly communicated with each other.

It is not necessary that the defendant have had the same intent that the principal offender had when the crime was committed or that it have intended to commit the particular crime committed by the principal offender.

An aider and abetter is legally responsible for the acts of other persons that are the natural and probable consequence of the crime in which it intentionally participates.

It is sufficient if you find beyond a reasonable doubt that the crime was committed by someone and that the defendant knowingly and intentionally aided and abetted the principal offender in committing the crime.

You may not draw any inference favorable or unfavorable towards the government or the defendant from the fact that any person was not named as a defendant in this

case or is not on trial before you at this time. Any such matter has no bearing upon our function as jurors.

Ladies and gentlemen, a corporation is a legal entity that may act only through its agents. The agents of a corporation are its officers, directors, employees and certain others who are authorized by the corporation to act for it.

A corporate defendant is entitled to the same individual and impartial consideration of the evidence that the jury gives to a personal defendant. A corporation may be found guilty of the offense charged or be found not guilty of the offense charged under the same instructions that apply to a personal defendant.

In order to sustain its burden of proof for the crime as charged in the indictment against the defendant, the government must prove to you beyond a reasonable doubt that each of the essential elements of the offense as given to you shortly was committed by an officer, director, employee or agent of the corporation.

In addition to the above, the government must also establish the following two elements beyond a reasonable doubt in order to sustain its burden of proof as to the defendant.

First, that each of the acts committed by the officer, director, employee or agent were within the course and scope of employment or agency given to the officer, director, employee or agent by the defendant.

And two, that the officer, director, employee or agent committed each of the essential elements or the offense with the intent to benefit the defendant.

Now, in order to establish that an act was committed or omitted within the course and scope of employment, the evidence must show that the act or omission related directly to the general duties that the officer, director, employee or agent was expected to perform by the defendant corporation. It is

not necessary for the government to prove that the act was authorized by the corporation formally or in writing.

An officer, director, employee or agent is not acting within the course and scope of his employment, however, if that person performs an act which the defendant has in good faith forbidden its officers, directors, employees or agents to perform. A corporate defendant like an individual defendant may not avoid responsibility for its action by meaningless or purely self-serving pronouncements. Similarly, a corporate defendant like an individual defendant may not be held responsible for acts which it tries to prevent.

Now, someone's intent and knowledge ordinarily cannot be proved directly because there is no way of directly looking into the workings of the human mind. But, you may infer the defendant's intent or knowledge from the surrounding circumstances. You may consider any statement made, or act done or omitted by the defendant, and all other facts and circumstances received in evidence which indicate the defendant's intent or knowledge. The defendant in this case is a corporation. Because corporations act through their agents, officers and employees, the knowledge of the corporation is considered to be collective knowledge of its agents, employees and officers formed in the pursuant of their corporate responsibilities.

In this case, if you determine beyond a reasonable doubt that Richard Douglas, Sun-Diamond's senior vice president for corporate affairs at the time, had the necessary knowledge and intent to commit a charged offense, that the intent may be attributed to Sun-Diamond Growers.

The defendant may also be to have harbored the knowledge and intent necessary to commit a crime, that is, to commit a criminal offense, if you determine beyond a reasonable doubt that Richard Douglas' knowledge and intent plus the knowledge and intent of other Sun-Diamond officers, directors, employees or agents considered as a whole had the knowledge and intent to commit a crime.

Finally, you may find that the defendant had the knowledge and intent to commit a crime, a criminal offense, if you find beyond a reasonable doubt that Sun-Diamond officers, directors, employees and agents other than Richard Douglas, individually or collectively, had the necessary knowledge and intent to commit the crime.

You may infer, but are not required to infer, that the person intends the natural and the probable consequences of acts done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during the trial.

You should consider all of the circumstances in evidence that you think are relevant in determining whether the government has proved beyond a reasonable doubt that the defendant acted with the necessary state of mind.

Now, let me tell you what the statutes say regarding the various offenses alleged by the government in this case and then I'll break them down into the counts that you will be considering in connection with this case.

Now, you've heard the term gratuity and illegal gratuity used throughout this trial. An illegal gratuity is a shorthand term for the conduct prohibited by the following statute.

In relevant part, the statute provides, "Whoever, otherwise than as provided by law for the proper discharge of official duties directly or indirectly, give, offers or promises anything of value to any public official for or because of any official act performed or to be performed by such public official or persons selected to be a public official shall be guilty of an offense against the United States."

Let me read that selection to you again. The language of the statute you are to consider is, ""Whoever offers or promises anything of value to any public official for or because of any official act performed or to be performed by such public official or persons selected to be a public official shall be guilty of an offense against the United States."

That is the statute that describes the offense generally termed illegal gratuity for a public official.

* * * * *

Now, that's the general language, that's the language of the statute which has application to various counts in this case, but I'll be more specific now and give you some more direct guidance on the counts and the elements of the offenses embraced by those counts.

Count One of the indictment charges that from on or about January the 5th, 1993 through on or about March the 11th, 1994, the defendant, Sun-Diamond Growers of California acting through Richard Douglas, its senior vice president for corporate affairs, gave, offered or promised things of value including tennis tickets, meals, limousine services, luggage, a print and a crystal bowl to the Secretary of Agriculture, Michael Espy, for or because of official acts performed or to be performed by the Secretary of Agriculture, Michael Espy.

In Count Two of the indictment, the charge is that in or about May, 1993, Sun-Diamond Growers of California acting through Richard Douglas its senior vice president for public affairs, gave, offered or promised a thing of value, mainly approximately $3,100 and the benefit thereof, the companionship of his girlfriend, Patricia Dempsey, to Secretary of Agriculture, Michael Espy, for or because of official acts performed or to be performed by the Secretary of Agriculture, Michael Espy.

Now, to prove the offense of illegal gratuity, the government must prove that the defendant Sun-Diamond knowingly and willingly gave, offered or promised a thing of value to Secretary of Agriculture, Mike Espy, for or because of his official position.

A gratuity is not the same thing as a bribe. The offense of illegal gratuity does not require the element of a quid pro

quo, the giving of one thing for another which is required to prove the offense of bribery, for example.

The crime does not require any exchange of promises between the public official and those alleged to have given him things of value. Nor, does it require that the gratuity be given or accepted in exchange for any specific official act. It is required, however, that the government prove that the gratuity was given because of the public official's position. The gratuity may be given in appreciation for their relationship or in anticipation of its continuation.

In addition, the government need not prove that the defendant gave, promised or offered the gratuity with intent to influence the public official. The gratuity statute makes it a crime for a person or company to knowingly and willingly give a public official a thing of value because of his official position whether or not the giver or receiver intended that particular official's acts be influenced.

The fact that there might be dual purposes for the gift or payment or a valid purpose which partially motivates the transaction is not a defense to accepting or receiving any illegal gratuity.

The essence of the crime is the official's position of as the receiver of the payment not whether the official agrees to do anything in particular, that is, not whether the official agrees to do any particular official act in return. Therefore the government, to prove that a gratuity offense has been committed, it is not necessary to show that the payment is intended for a particular matter then pending before the official. It is sufficient if the motivating factor for the payment is just to keep the official happy or to create a better relationship in general with the official.

In order to sustain its burden of proof for the crime of giving, offering or promising anything of value to the Secretary of Agriculture as charged in Counts One and Two of the indictment, the government must prove each of the following three elements beyond a reasonable doubt:

First, at the time the gratuity was offered or promised, Michael Espy was a public official or selected to be a public official.

Second, that the defendant, Sun-Diamond Growers of California, acting through Richard Douglas, its then senior vice president for corporate affairs, knowingly and willingly gave, offered or promised something of value to Michael Espy otherwise than as provided by law for the proper discharge of official duty.

Third, the defendant Sun-Diamond Growers of California acting through Richard Douglas, its senior vice president for corporate affairs, did so for or because of an official act performed or be performed by Michael Espy. I will define the term, official act separately.

Now, this statute does not require that Sun-Diamond gave the gratuities with the intent to influence Secretary Espy. It is sufficient if Sun-Diamond provided Espy with unauthorized compensation simply because he held public office.

Ladies and gentlemen, the term public official means an officer or employee or person acting for or on behalf of the United States or any department agency or branch of government in any official function. The term "selected to be a public official" includes any person who has been officially informed that he or she will be so nominated or appointed.

The parties have stipulated, and therefore I instruct you, that during the time periods alleged in Counts One and Two specifically between January the 5th, 1993 and March the 11th, 1994, Michael Espy was a public official or selected to be a public official, that is, Secretary of Agriculture.

The term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy which may at any time be pending or which may by law be brought before any public official in such official's official capacity on such official's place of trust or profit.

In considering the charges in Counts One and Two, it is not a defense that the actions taken, if any, by Secretary Michael Espy with respect to matters of concern to Sun-Diamond Growers of California were actually lawful, desirable or even beneficial to the public.

It is not a defense to the crime of providing an illegal gratuity to a public official for or because of an official act as charged in Counts I and Two of the indictment that Secretary Espy may not have had the authority, power or ability to affect matters that Sun-Diamond Growers had pending at USDA.

In other words, the government need not prove that the Secretary Espy or the Department of Agriculture was actually capable of providing some official act at the time the thing of value was given. Even if it would have been impossible for the Secretary of Agriculture Espy to have affected or influenced the outcome of matters that Sun-Diamond Growers of California had an interest in, a gratuity offense may still be committed if the government proves each of the necessary three elements of the offense beyond a reasonable doubt.

In order for you to convict Sun-Diamond of violating the gratuity statute, you must find beyond a reasonable doubt that Sun-Diamond gave the gifts to Mr. Espy for or because of Mr. Espy's official government position and not solely for reasons of friendship or social purpose.

It is not a defense to providing an illegal gratuity to Michael Espy that Sun-Diamond Growers of California did not intend to influence Michael Espy at the Department of Agriculture to take any particular official action regarding, for example, methyl bromide or market promotion program's fund. It is, however, a defense to the charges contained in Counts One and Two that Sun-Diamond Growers of California did not provide a gratuity to Michael Espy for or because of his official position.

It is not a defense to the crime of providing an illegal gratuity to a public official as charged in Counts One and

Two of the indictment that Secretary Espy might have performed his duties in the same manner if he had not received the gratuity.

The term "for or because of an official act performed or to be performed" -- would you like for us to take a little break, ma'am?

THE COURT: Would you like us to take a little break?

JUROR: Yes.

THE COURT: We will stop for a few minutes and let you all get a drink of water, if you would like and we'll reconvene in five minutes. Please don't discuss the case. You can leave your pads and pencil in the chair.

We will take five minutes.

(Jury out at 10:36 a.m.]

* * * * *

(Jury in at 10:57 a.m.]

* * * * *

Now, the government must prove that the gratuity was knowingly and willing given for or because of an official act performed or to be performed by the Secretary of Agriculture, Michael Espy. That means that the government must prove that Sun-Diamond Growers of California, acting through its senior vice president for corporate affairs, Richard Douglas, and knowingly and willingly gave the gratuities, at least in part, because of the Secretary's position in appreciation of Sun-Diamond Growers of California's relationship with him as a public official or in anticipation of the continuation of its relationship with him as a public official.

The government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all. In other words, the government need not prove that the gratuity was given as a quid pro quo, that is, in exchange for

any one specific action performed or to be performed by the Secretary. For example, the government need not prove that when Sun-Diamond gave Secretary Espy a thing of value on a particular date, that Secretary Espy took any particular official action or changed any particular official action with respect to matters pending before the USDA in which the defendant had an interest because of Espy's receipt of the thing of value.

The government also does not have to prove that there was any agreement between Sun-Diamond Growers of California and Secretary Espy regarding the giving or receiving of gratuities in exchange for the performance of any particular official act.

With respect to official acts, the government has to prove that Sun-Diamond Growers of California gave knowingly and willingly Secretary Espy things of value while it had issues before the United States Department of Agriculture.

The phrase, anything of value, means any item, whether tangible or intangible that the person giving or offering or the person demanding or receiving considers to be worth something. I instruct you that you may consider airplane tickets, tennis tickets, transportation, luggage, meals and intangible items such as the companionship of a friend as things of value.

* * * * *

All right, ladies and gentlemen, so what I've given you so far as far as the offenses are concerned, is that I talked to about generally about Counts One and Two. I've defined for you an illegal gratuity and I've given you certain facts that the government must prove in order to secure a conviction and I've given you those facts as they relate to the particular counts.

Then, I have given you the general and overall description of what the elements of the offenses are and how those elements are defined and how the terms within those

elements are defined. And that concludes more or less what you need to know about Counts Three and Four.

Now, I'm going to speak about Counts Five through Nine and that will conclude my description of the counts in the indictment, the elements that relate to them and the general information that you must have in order to listen intelligently to the arguments that are going to be made and then I will conclude before Mr. Greenberg begins his opening statement by being specific about what the theory of the defendant's case is.

* * * * *

Ladies and gentlemen, I'm going to speak to you now about the theory of the defendant's case and I will remind you, as I go through this recitation, that these statements represent the position that the defendant has taken. These statements represent the theory that the defendant's case takes and among the theories that the defendant through counsel will argue during closing arguments.

Now, the defendant maintains, with respect to Count One that the first, that is the first gratuity count, that the evidence establishes that Richard Douglas and Mike Espy were first and foremost friends who supported and cared about each other and trusted each other. That Richard Douglas and Sun-Diamond did not need to provide any gift to Mr. Espy in order to cultivate or to develop a relationship. The theory is that the relationship was already there.

The defendant claims with respect to these gifts that have been mentioned in the evidence such as the luggage and the other items, that the luggage was given, for example, to Mr. Espy as an honorarium for his speaking. It was not given to him as a gratuity as otherwise alleged.

The defendant asserts further that Sun-Diamond did not have any knowledge that Mr. Douglas purchased the tickets for the U.S. Open which in any event was, according to the

defense, a purely social event among friends and their girlfriends.

And the defendant further asserts as part of its theory that the picture frame was never given to Mr. Espy.

With respect to Count Two, the theory of the defendant's case is essentially that the gratuity relating to the trip to Greece, that is the trip to the conference, the International Nut Council or Congress, paid for the air fare for Secretary Espy's girlfriend to Greece, that no Sun-Diamond funds were used in this transaction and Mr. Douglas was contacted by the INC because he was Mr. Espy's close friend and not in order to exert any type of gratuity upon him or to impose any type of gratuity or to offer him any type of gratuity as the government alleges because of his official position.

* * * * *

THE COURT: Yes.

Ladies and gentlemen, that concludes the initial reading of the instructions. There will be a short block of instruction I will be giving you at the end. Mr. Greenberg and Mr. Hibey will be giving their closing arguments now.